165-553

165-553

RECORD, CASE No. 15,331.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., ~~947~~. ~~537~~ ~~540~~ 33

DAVID G. SWAIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 9, 1893.

RECORD, CASE No 15,331.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 947.

DAVID G. SWAIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	7	4
Findings of fact	8	4
Letter from Secretary of War to the President, April 22, 1884	8	5
Endorsement of the President, April 22, 1884	11	7
Order of the Secretary of War, April 22, 1884	11	7
Findings of the court of inquiry	12	8
Endorsement of acting adjutant general, June 30, 1884	13	9
Letter from Secretary of War to Gen'l Swaim, July 25, 1884	14	10
Motion to dismiss for want of jurisdiction of the court-martial	15	10
Order of the Secretary of War, June 30, 1884	16	11
Order of the acting adjutant general, August 27, 1884	16	12
Order of the Secretary of War, September 27, 1884	16	12
Proceedings of the court-martial	17	13
Charges and specifications	17	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 13, 1893.

	Original.	Print.
Findings	22	18
Endorsement of the President, February 11, 1885	26	22
Opinion of the Attorney General, February 10, 1885	27	23
Endorsement of the President, February 14, 1885	31	28
Endorsement of the President, February 24, 1885	32	29
List of general officers and their stations	33	30
Conclusions of law	36	32
Opinion	36	32
Judgment	50	47
Application for and allowance of appeal	51	48
Clerk's certificate	52	48

1 In the Court of Claims of the United States.

No. 16889.

(Filed February 24, 1891.—J. R.)

DAVID G. SWAIM
vs.
THE UNITED STATES OF AMERICA.

I.—*Petition.*

To the honorable the judges of the Court of Claims:

David G. Swaim, claimant, alleges that he is a citizen of the United States, and was on the 30th day of June, 1884, and still is judge advocate general of the Army of the United States, with the rank, pay, and allowances of a brigadier general therein; that his official residence was at said time and still is in the District of Columbia; that on the 25th day of July, 1884, charges and specifications were preferred against him by direction of the President, and by order of the Secretary of War an order was addressed to Major R. N. Scott, third artillery, to draw up and prepare the same; that a general court-martial was appointed by the direction of the President
2 for the trial of said charges, and the order appointing the same was signed by Robert T. Lincoln, Secretary of War; that said charges, with the proceedings had thereon, are promulgated in general court-martial orders No. 19, from headquarters of the army, dated February 24, 1885.

2nd. That the Secretary of War and President of the United States were the accusers and prosecutors of claimant on said charges and convened said court-martial for the trial thereof; that the general officer commanding the Army of the United States, a separate army, or a separate department, or any or either of them was or were not the accusers or prosecutors of claimant under said charges; that neither the President nor Secretary of War were empowered by the 72d article of war or by authority of any other statute or the Constitution to appoint said court-martial, nor were they, in any event, empowered to originate said charges against claimant and to appoint the said court-martial for the trial thereof.

3rd. Said court-martial was composed of five general officers and six colonels; that a condition of peace existed at the time and there were eighteen general officers of equal or superior rank to claimant available for detail on said court; that a number of the officers placed on the detail for the court were selected from those who were prejudiced against claimant or with whom he had, in the discharge of his official duty, expressed decided differences of opinion; that the detail of said six colonels who were inferior in rank to claimant could have been avoided, and said court-martial was constituted in violation of the 79th article of war.

4th. Claimant was deprived of a fair and impartial trial before

said court-martial by reason of the many errors of law committed by it in the following particulars:

a. The disallowance of proper challenges to members.

3 *b.* The introduction of an associate counsel or assistant to the judge advocate of the court to assist in the prosecution of claimant before said court-martial without the authority or sanction of the appointing authority, said associate counsel not having been sworn, and who was permitted to examine witnesses, argue exceptions, motions, rules, and to prosecute claimant on said charges the same as though he had been regularly appointed judge advocate.

c. The introduction of illegal evidence over the objections of claimant.

d. The rejection of legal evidence for the defense.

e. Rejecting the evidence of a competent witness offered by the defense.

f. Illegal, unjust, and oppressive action of the reviewing authority and court, the reviewing authority having referred another set of charges of a serious and aggravated nature, alleging fraud under conduct unbecoming an officer and a gentleman (promulgated in general court-martial orders No. 20, headquarters of the army, February 24, 1885), to said court-martial for trial before the conclusion of the trial of said charges promulgated in said court-martial orders No. 19, and the said court having heard, practically, all the evidence for the prosecution thereon without affording claimant an opportunity to reply, the reviewing authority with this knowledge twice returned the case promulgated in said court-martial orders No. 19 for reconsideration and urging a finding of conduct unbecoming an officer and a gentleman and a sentence of dismissal, said reviewing authority sending to said court at the same time a carefully prepared opinion or argument of the Attorney General severely commenting upon the conduct of claimant and advising a finding of conduct unbecoming an officer and a gentleman and dismissal, and thus the case promulgated in said court-martial order No. 19 was re-

4 opened, reargued, and resubmitted on its merits to the court with closed doors, under the most unfavorable and adverse conditions to claimant, without affording him an opportunity to reply and keeping him in profound ignorance of the proceedings being had in his case, which proceedings are promulgated in said court-martial order No. 19, wherein the three several sentences adjudged appear in successive severity by reason of the illegal and unprecedented methods adopted. As will be seen by said court-martial order No. 19, the court in adjudging the third sentence revoked the second sentence, but in adjudging the second sentence the first sentence was not revoked and is thus standing, but without approval.

5th. The findings of the court-martial as set forth at pages eight, nine, ten, and eleven of said court-martial orders No. 19 are insufficient in law to show the commission of any crime or offense, military, civil, or moral; that the whole subject-matter embraced in said findings refers and pertains to claimant's personal dealings and transactions with Bateman & Co. referred to in said findings, and

the court fails to find any facts or any lawful, sensible, or rational grounds showing evasion, uncandidness, or an intention to deceive the Secretary of War in said private and personal transactions; that said Bateman & Co. did a pretended business of buying and selling stocks on margin in the city of Washington, D. C., but said firm was in no manner connected with the War Department or military service of the United States or under military protection as camp followers; that said findings in any event do not support the charge of conduct to the prejudice of good order and military discipline, in violation of the sixty-second article of war or any other military charge known or recognized by the military code.

6th. By the pretended force and effect of the 3d and last sentence adjudged and promulgated in said court-martial orders No. 19, namely:

5 "To be suspended from rank and duty for twelve years, and to forfeit one-half his monthly pay every month for the same period."

one-half of claimant's monthly pay as judge advocate general, as aforesaid, every month from the 24th day of February, 1883, to the time of filing this petition has been unlawfully retained and withheld from him; that his commutation allowance for quarters and his allowance of forage for his horses authorized by law, and his allowance of fuel have also been unlawfully withheld from him during the same period; that under the alleged operation of said third sentence claimant is thus not only deprived of one-half his pay, as alleged, but his allowances to which he is entitled under the law, there being nothing in the terms or just and legal operation of said sentence, even if it were legal, justifying such deprivation or the withholding or retention of his allowances according to his rank.

That by reason of the premises the proceedings, findings, and sentence of said court-martial promulgated in said court-martial orders No. 19 are illegal and void.

Wherefore claimant demands judgment against the defendant that the proceedings, findings, and sentence of said court-martial promulgated in said general court-martial orders No. 19 from headquarters of the army, dated February 24, 1885, be declared and adjudged void, and for judgment against defendant in favor of claimant for half of his monthly pay, retained and withheld every month from the 24th day of February, 1885, to the date of filing this petition, at the rate of $229.16\frac{2}{3}$ each month, amounting to $16,500.00;

And judgment for the further sum of $60 for each and every month from the 24th of February, 1885, to the time of filing this petition, on account of allowance for commutation of quarters withheld and retained by alleged operation of said third sentence, amounting to the sum of $4,320.00;

6 And judgment for the further sum of $20 for each and every month from the 24th of February, 1885, to the time of filing this petition, on account of forage withheld from him by the alleged operation of said third sentence, amounting to the sum of $1,440.00;

And judgment for the further sum of $15 per month for each and every month from the 24th day of February, 1885, to the time of filing this petition, on account of fuel withheld from him by alleged operation of said third sentence, amounting to the sum of $1,080.00;

Amounting in all to the aggregate sum of $23,340.00.

D. G. SWAIM,
Judge Advocate General U. S. Army, Claimant.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

David G. Swaim, being duly sworn, says that he is the claimant mentioned in the foregoing petition; that the matters and statements therein contained are true, to the best of his knowledge and belief, and that he is justly entitled to the amount for which he claims judgment, after allowing all just debts and offsets.

D. G. SWAIM,
Judge Advocate General, U. S. Army, Claimant.

Subscribed and sworn to before me this twenty-third day of February, 1891.

S. A. TERRY,
[SEAL.] *Notary Public.*

7 II.—*General Traverse. Filed May* 13, 1891.

In the Court of Claims of the United States, December Term, A. D. 1892.

DAVID G. SWAIM
vs.
THE UNITED STATES. } No. 16889.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney General.

8 III.—*Findings of Fact and Conclusions of Law.*

Findings of fact.

The case having been heard by the Court of Claims the court, upon the evidence, finds the facts to be as follows:

I.

That on the 21st day of February, 1881, the said David G. Swain was appointed and commissioned by the President of the United States judge advocate general, with the rank of brigadier general, in the service of the United States, to rank as such from the 18th day of February, 1881.

II.

At the time of their respective dates the following communications, orders, and reports were sent, issued, or made:

WAR DEPARTMENT,
WASHINGTON CITY, *April 22nd*, 1884.

SIR: On the 16th instant Mr. A. E. Bateman, of this city, a member of the firm of Bateman & Co., bankers, addressed to me a
9 letter of which a copy is enclosed, in which he alleged that General D. G. Swaim, the judge advocate general of the army, had committed a fraud upon said firm, the nature of which he described as follows:

"Some two years ago the said D. &. Swaim, having deposited the sum of five thousand dollars, received upon his departure for the West a simple due-bill at his request, to have in case an accident should befall him. This amount was checked out subsequent to that date by said D. G. Swaim, for which we have a number of vouchers. After having drawn all the money out, and a settlement being made, he negotiated and transferred the due-bill for the full amount with certain parties in this city."

Mr. Bateman further alleged that General Swaim "assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent and triplicates of outstanding accounts," and asked "that a court-martial be ordered for the trial of the said D. G. Swaim on charges preferred."

On the next day, and before any action was taken on the communication of Mr. Bateman, another communication from him was received by me in the following words:

"The suit against our firm on the due-bill mentioned in my charges of yesterday against Gen. D. G. Swaim having been withdrawn and the differences between Gen. Swaim and myself satisfactorily settled, I hereby withdraw the charges contained in my letter of April 16th, against said Gen'l D. G. Swaim, he claiming they were made under a misapprehension of facts, which I concede."

On the next day, these letters were by me referred to General Swaim, by an endorsement upon the one first received, "for such remarks as he may desire to submit upon the allegations made in the within communication, and for any application he may desire to make."

On the same day General Swaim returned the papers with the following endorsement:

"I had a bank account with Bateman & Co., and besides I loaned

them five thousand dollars at 6 per cent. interest for which they gave me an instrument reading:

"'Due D. G. Swaim or order five thousand dollars. Value received.

"'BATEMAN & CO.

"'Washington, D. C., July 15, 1882.'

"This is a negotiable promissory note according to all the authorities on the subject and was transferred in due course of business and payment demanded but refused. Bateman & Co. claimed set-offs to the note, the correctness of which I denied. I endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect. The note was put in suit, but they now agree to refer the whole subject to an arbitrator, and with that view the suit has been withdrawn. The note (or due-bill as it is incorrectly termed) is now in the possession of Bright and Humphrey, the indorsees thereof.

"In regard to the fraudulent pay vouchers the facts are as follows: Lieut. Colonel A. P. Morrow, at the time a member of General Sherman's staff, a comparative stranger to me at the time, came to my office, in company with another officer, and requested me to advance him several months' pay on his pay accounts. I told him I did not do that kind of business, but in a friendly way referred him to brokers in the city doing such business, and named Bateman & Co., with others. I may have given him a note of introduction to that firm. I did not know for some time afterwards that Bateman & Co. had advanced money to Col. Morrow on his pay accounts. It will be seen that I had no concern or interest in these pay accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no knowledge of any other pay-account transaction with Bateman & Co. The only request I have to make is that this statement may receive the same publicity that the within false accusations received."

Mr. Bateman thought it proper to give to the press a copy of his first letter, on the day of its date, and the grave charges made by him against the judge advocate general were thus given a wide publicity. His object was apparently to enforce a pecuniary adjustment by means as offensive as possible; and his letter of the next day shows that notwithstanding the bitterness of his attack, a satisfactory settlement was quickly made, one element of which was his formal withdrawal of his charges with a statement which seems carefully framed to avoid charging himself with having recklessly made false and libellous charges in his previous letter.

Mr. Bateman's business adventures are not entitled, under any circumstances, to the protection of the War Department; but the integrity and uprightness of the officer of the army who reports upon every court-martial proceeding which it is the duty of the Secretary of War to submit to the President for his final action, is a matter of the deepest concern to the President, and to every one of his military subordinates. The law requires that "conduct unbecoming an

officer and a gentleman" shall be followed by a sentence of dismissal from the military service, and the President alone can mitigate the sentence. If there could be any distinction every consideration requires that, more than any other officer of the army, the judge advocate general should be free, beyond question, from an imputation of such conduct.

It is a matter of deep regret to me, therefore, that when the judge advocate general was given an opportunity to comment upon the charges in question, he, in respect to the first charge, either was not able, or did not see fit to make an explicit denial of its essential part, or to give in detail such facts and circumstances as would show the falsity of the charge. Instead of doing so he has contented himself with a statement which contains nothing to which Mr. Bateman's allegations might not possibly be a truthful supplement.

So, in respect to the second charge—assisting to negotiate army pay vouchers with Bateman & Co., which General Swaim knew to be fraudulent, and triplicates of outstanding accounts—General Swaim's response fails to notice that the charge, as made by Mr. Bateman, refers not merely to a negotiation of army pay accounts, but to a negotiation of pay accounts alleged to have been known to General Swaim as fraudulent; and to that element of the charge no allusion is made in his response. It is not overlooked that the final clause of the response asking for its publication, refers to the accusations as false; but his specific answers to them are evidently intended to be found in what has gone before.

If there is no proof to sustain the charges made, or if the circumstances can be explained so as to remove every impression of
11 improper conduct on the part of the officer in question, I am of the opinion that the welfare of the military service requires that the proper steps should be taken for his vindication. It is not a personal but an official and public matter. He has not, in my view, recognized this necessity; and as he has not done so, I am compelled to recommend to you the appointment of a court of inquiry to examine into the accusations above mentioned, and to report the facts developed by their investigation, and give their opinion thereon.

I have the honor to be, very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

The President.

EXECUTIVE MANSION, *April* 22, 1884.

Respectfully returned to the Secretary of War with the direction to appoint a court of inquiry, as within recommended.

By direction of the President:

FRED. J. PHILLIPS,
Private Secretary.

WAR DEPARTMENT, *April* 22, 1884.

By direction of the President of the United States a court of inquiry is hereby appointed to examine into the accusations against

Brigadier General David G. Swaim, judge advocate general United States Army, contained in a letter addressed by A. E. Bateman to the Secretary of War, bearing date April 16, 1884.

The court will make a full and thorough investigation of all matters embraced in the letter of Mr. Bateman, and will report the facts developed by its investigation and give an opinion thereon.

Detail for the court: Major General John Pope, U. S. Army; Brigadier General Christopher C. Augur, U. S. Army; Brigadier General Delos B. Sackett, senior inspector general, U. S. Army.

Major Robert N. Scott, 3rd artillery, will act as judge advocate and recorder of the court.

The court will meet in the city of Washington, D. C., on Monday, the 5th day of May, 1884.

ROBERT T. LINCOLN,
Secretary of War.

12 The court of inquiry found as follows:

About October 15th, 1881, Mr. J. Stanley Brown entered as a partner into the firm of Bateman & Co., bankers and stock brokers doing business in the cities of New York and Washington. In May, 1882, Mr. Brown, to increase his interest in the firm, borrowed $5,000.00 from Brig. Gen'l David G. Swaim, for which Gen'l Swaim was to receive 6 per cent. interest and 10 per cent. of the profits accruing to Mr. Brown while holding that money.

In July, 1882, Mr. Brown determined to withdraw from the firm, and on the 15th of that month, in notifying Gen'l Swaim of that fact, Mr. Brown announced his wish to repay the money borrowed and expressed regret that his action would put Gen'l Swaim to the inconvenience of a reinvestment. Gen'l Swaim, Mr. A. E. Bateman, and Mr. Brown thereupon had some discussion upon the transfer and reinvestment of that loan. This discussion was, however, inconclusive, and Mr. Bateman, for the firm of Bateman & Co., gave to General Swaim, at his request, what is known in this case as the "due-bill," a copy of which is appended to this record as Exhibit L. This due-bill appears to have been an acknowledgment of the indebtedness of Bateman & Co. to Gen'l Swaim on account of the deposit with them of the $5,000.00 repaid by Mr. Brown.

During and after Mr. Brown's connection with the firm of Bateman & Co. General Swaim bought and sold stocks on margins through its agency, the usual accounts being kept by the firm. During all his dealings with Bateman & Co. General Swaim kept but one account with them, which included all those stock transactions and such other monetary dealings as he had with them.

Disagreements about accounts, or a failure on the part of Gen'l Swaim to understand them, occurred, and on several occasions the bank statements were furnished him and offers made to explain such items as he did not understand. In November, 1883, a consolidated statement of his accounts was furnished to General Swaim by the bank, showing a balance in his favor of $33.89. Gen'l Swaim caused statements of his accounts with the bank to be prepared, but as these omitted some transactions they were incomplete. A Mr. Terry, pro-

fessing to be an expert accountant, was sent with one of these statements (prepared by himself) to the bank, by Gen'l Swaim, to get some explanations and to complete the statement by reference to the books. The books were shown to him and all the information asked for at the bank was given.

In the consolidated statement furnished by Bateman & Co. to General Swaim he is credited under date of July 20th, 1882, with the $5,000 deposited by Mr. Brown upon leaving the firm. As against this and other credits Gen'l Swaim is charged with checks drawn upon the bank, all debits arising from his stock operations, etc.

13 About February 15th, 1884, Gen'l Swaim assigned the due-bill, by indorsement, to Bright, Humphrey & Co. (builders) to collect and credit to him on his account with them. Mr. Humphrey testified that Gen'l Swaim told him to collect whatever was due on the due-bill and credit him with whatever the amount might be. Mr. Beall, the cashier of Bateman & Co., testified that Mr. Humphrey presented the due-bill to him as representative of the firm, and demanded payment of the nominal face value, principal and interest. Bateman & Co. refused payment and thereupon General Swaim directed Bright, Humphrey & Co. to bring suit, he promising to defray the expenses of litigation. Suit was brought for $5,000.00, with interest and costs. (See Exhibit E.)

General Swaim maintains that he only brought that suit to determine the difference of a few hundred dollars between him and Bateman & Co., but that statement does not appear to have been known to Mr. Bateman until after he had preferred charges against Gen'l Swaim.

On the 16th of April, the day after the suit had been instituted, Mr. Bateman preferred his charges against Gen'l Swaim and furnished copies of them to the public press. On the next day, these charges having appeared in the newspapers, Mr. M. M. Parker, who appears as the friend of both parties to the controversy, brought them together at his office for the purpose of reconciling or arranging their difficulties. That meeting resulted in an understanding, the record evidence of which appears in the guarantee of General Swaim for surrender of the due-bill to Mr. Parker and the agreement of Gen'l Swaim and Mr. Bateman to submit their business differences to the arbitration of Hon. Benj. Butterworth.

In the conversation leading to these arrangements reference was made only to so much of Mr. Bateman's charges as related to the due-bill suit. Mr. Bateman denies that the due-bill was to be submitted to arbitration, but both Gen'l Swaim and Mr. Parker testifying that such was their understanding of the agreement. The agreement having been made Mr. Bateman addressed his second letter to the Secretary of War, withdrawing his charges and conceding that they had been made under a misapprehension of facts. The Secretary of War, however, on the 18th of April, transmitted both Mr. Bateman's letters to Gen'l Swaim by an indorsement, calling for a report or explanatian upon the subject. Gen'l Swaim's reply was returned the same day. (See Exhibit A.)

After the publication of General Swaim's reply to the Secretary of War Mr. Bateman, in a personal interview with General Swaim, charged that that reply was untrue and declared that it had put an end to the agreement between them. Meanwhile the Secretary of War, not being satisfied with General Swaim's explanations, reported the matter to the President recommending a court of inquiry.

ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *June* 30, 1884.

Respectfully referred to Major R. N. Scott, 3rd U. S. artillery, who will prepare charges and specifications against Brigadier General David G. Swaim, judge advocate general, U. S. Army, and Lieut. Colonel A. P. Morrow, 6th U. S. cavalry, based upon the information contained in the within record.

By order of the Secretary of War.

C. McKEEVER,
Acting Adjutant General.

14 III.

Lieut. General Sheridan was the commanding general of claimant at the time said charges were preferred upon which claimant was put on trial, and said General Sheridan did not prefer said charges nor cause nor direct the preferring thereof and was not the accuser or prosecutor of claimant in the trial had thereunder.

IV.

On the 25 day of July, 1884, the following communication was addressed to said General Swaim:

WAR DEPARTMENT,
WASHINGTON CITY, *July* 22, 1884.

Brigadier General David G. Swaim, judge advocate general, U. S. Army, Washington, D. C.:

SIR: By direction of the President you will consider yourself in arrest—your limits being the District of Columbia—and, on the 10th of September, 1884, will report in person to the president of the general court-martial appointed to meet on that day in this city (by special orders, No. 151, headquarters of the army, dated June 30, 1884,) for trial on charges a copy of which is herewith transmitted to you.

Very respectfully, ROBERT T. LINCOLN,
Secretary of War.

15 V.

At the trial before the general court-martial claimant, through his counsel, presented the following motion:

"In the matter of the charges and specifications pending against Brigadier General David G. Swaim, judge advocate general of the United States Army, before the general court-martial appointed to meet in the city of Washington, D. C., by special orders No. 151,

headquarters of the army, dated June 30, 1884. The said David G. Swaim in the above matter, not thereby assenting to the jurisdiction of the said court, in the matter of the charges preferred against him on the accusation of Robert N. Scott, major of the 3rd artillery, and brevet lieut. colonel of the United States Army, and now pending before such court, and coming only for the purpose of excepting to such jurisdiction of the said court, as stated, to try such charges, by this motion now comes and most respectfully submits this motion, to wit: That the court dismiss the said charges and prosecution thereof for want of jurisdiction in the court to entertain, hear, consider, try, or decide upon such charges and specifications, or either of them, and for ground of such motion assigns the following:

"It appears on the face of the said charges and specifications that the accused, David G. Swaim, was, at the convening of the said court, and now is, an officer of the Army of the United States, and judge advocate general of such army, and being such, this court is judicially made cognizant of the fact that the accused is an officer of such army, of the rank of brigadier general, and that his commander is the lieutenant general of the army, and the records of the court show that such lieutenant general of the army, to wit, General Philip H. Sheridan, is not the accuser of the said David G. Swaim in this case.

"It further appears by the records of this court that this court was appointed by the President on the 30th of June, 1884, by special orders No. 151, and that, by the order of the President, through the Secretary of War, on the date of July 25th, 1884, the said accused was put in arrest and directed to report to the said court so convened by the President for trial on said charges.

"Wherefore, and from the facts so appearing to this court, it is shown of record that in the said pending case and charges the commander of the said accused is not the accuser of David G. Swaim, and that by the statute in such case made and provided, being article 72 of the articles of war, the accused can only be tried before a court-martial appointed as this court is by the President, when the commander of the accused is his accuser; and therefore this court has no jurisdiction to hear, try, or decide on the said charges so pending, and the accused now moves that the charges aforesaid be dismissed for such want of jurisdiction.

"CHARLES H. GROSVENOR,
"SHELLABARGER & WILSON,
"*Counsel and Attorneys for David G. Swaim.*"

16 VI.

On the day of their respective dates the following orders issued:

WAR DEPARTMENT, WASHINGTON, *June* 30, 1884.

By direction of the President a general court-martial is appointed to meet in this city at 11 o'clock a. m. on Wednesday, the 10th day of September, 1884, or as soon thereafter as practicable, for the trial of such persons as may be brought before it.

Detail for the court: Major General John M. Schofield; Brigadier General Alfred H. Terry; Brigadier General William B. Rochester, paymaster general; Brigadier General Samuel B. Holabird, quartermaster general; Brigadier General Robert Murray, surgeon general; Brigadier General John Newton, chief of engineers; Colonel Charles H. Smith, 19th infantry; Colonel George L. Andrews, 25th infantry; Colonel John R. Brooke, 3d infantry; Colonel Luther P. Bradley, 13th infantry; Colonel Romeyn B. Ayers, 2d artillery; Colonel Elwell S. Otis, 20th infantry; Colonel Henry M. Black, 23d infantry; Major Asa B. Gardiner, judge advocate.

The court is empowered to proceed with the business before it with any number of members present not less than the minimum prescribed by law.

Upon the final adjournment of the court the members will return to their proper stations.

ROBERT T. LINCOLN,
Secretary of War.

Special Orders, No. 201.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *August* 27, 1884.

(Extract.)

1. With the approval of the President, and by direction of the Secretary of War, the meeting of the general court-martial, instituted by paragraph 2, special orders, No. 151, June 30, 1884, from this office, to assemble in this city on Wednesday, the 10th day of September, 1884, is postponed until 11 o'clock a. m. on Saturday, the 15th day of November, 1884, or as soon thereafter as practicable.

* * * * * * *

By command of Lieutenant General Sheridan:

CHAUNCEY McKEEVER,
Acting Adjutant General.

Official:

O. D. GREENE,
Ass't Adjutant General.

WAR DEPARTMENT, WASHINGTON, *September* 27, 1884.

By direction of the President, Brigadier General Nelson A. Miles is detailed as a member of the general court-martial appointed to meet in this city by an order from the War Department, dated June 30, 1884, published in special orders, No. 151, June 30, 1884, from the headquarters of the army, vice Colonel Elwell S. Otis, 20th infantry, hereby relieved.

ROBERT T. LINCOLN,
Secretary of War.

17 ROOMS OF THE GENERAL COURT-MARTIAL,
40 AND 41 CORCORAN BUILDING,
WASHINGTON, D. C., *November* 15, 1884.

The court met pursuant to the foregoing orders at 11 o'clock a. m.

Present: (1) Major General John M. Schofield, U. S. A.; (2) Brigadier General Alfred H. Terry, U. S. A.; (3) Brigadier General Nelson A. Miles, U. S. A.; (4) Brigadier General William B. Rochester, paymaster general; (5) Brigadier General Samuel B. Holabird, quartermaster general; (6) Brigadier General Robert Murray, surgeon general; (7) Brigadier General John Newton, chief of engineers; (8) Col. Charles H. Smith, 19th infantry; (9) Col. George L. Andrews, 25th infantry; (10) Col. John R. Brooke, 3rd infantry; (11) Col. Luther P. Bradley, 13th infantry; (12) Col. Romeyn B. Ayers, 2nd artillery; (13) Col. Henry M. Black, 23rd infantry, and Judge Advocate Asa Bird Gardiner, judge advocate of the court.

The court then proceeded to the trial of Brigadier General David G. Swaim, judge advocate general United States Army, who thereupon came before the court, and having heard the foregoing orders convening the court read, was asked if he had any objection to any member present named in such orders to which he replied as follows:

General SWAIM: I desire to introduce a motion asking the authority or right of a court-martial convened by the President of the United States, by his order, to proceed with the trial of these charges, inasmuch as I am not accused by my commanding officer. I also desire to introduce to the court Judge Shellabarger, who will represent me in this matter. My counsel in the case will be Messrs. Shellabarger and Wilson and Gen'l Charles H. Grosvener, of Ohio. Gen'l Grosvenor will not be able to be present, however, to-day.

General Court-martial Orders, No. 19.

HEADQUARTERS OF THE ARMY,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, *February* 24, 1885.

I. Before a general court-martial which convened in Washington, District of Columbia, pursuant to special orders, No. 151, dated June 30, 1884; No. 201, dated August 27, 1884; and No. 227, dated September 27, 1884, from these headquarters, and of which
18 Major General John M. Schofield is president, and Brigadier Generals Nelson A. Miles; Samuel B. Holabird, quartermaster general; Robert Murray, surgeon general; John Newton, chief of engineers; and Colonels Charles H. Smith, 19th infantry; George L. Andrews, 25th infantry; John R. Brooke, 3d infantry; Luther P. Bradley, 13th infantry; Romeyn B. Ayres, 2d artillery; and Henry M. Black, 23d infantry, are members, was arraigned and tried—

Brigadier General David G. Swaim, judge advocate general U. S. Army, on the following charges and specifications:

Charge I. "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

Specification 1st. In that he, Brigadier General David G. Swaim, judge advocate general U. S. Army, having, on or about the 15th day of July, 1882, deposited the nominal sum of five thousand dollars with the firm of Bateman & Co., bankers and brokers, of Washington, D. C., of which said nominal sum one thousand dollars was represented by his, Swaim's, own check for that amount upon said firm, for which deposit he received an acknowledgment in writing, in words and figures as follows:

"Due D. G. Swaim, or order, five thousand dollars, for value received.

"BATEMAN & CO.

"Washington, D. C., July 15th, 1882.

"Ten per cent. and interest 6 per cent."

which said acknowledgment was given by Bateman & Co., and received by the said Swaim upon the understanding between the said parties that it was to serve as a mere memorandum of the deposit aforesaid, and the said Swaim having, in the course of his business transactions with that firm, reduced the balance remaining to his credit therewith to the amount of thirty-three $\frac{89}{100}$ dollars, and the said Swaim having subsequently duly received a statement of his accounts from said firm of Bateman & Co., showing there had been credited to him the said deposit of five thousand dollars, and that there was then due him only such balance of 33.89 dollars, he, the said Swaim, did, nevertheless, thereafter, on or about February 15, 1884, duly assign and transfer the aforesaid written acknowledgment of July 15, 1882, by his indorsement thereon, in words and figures as follows:

"Pay to Bright, Humphrey & Co., or order.

"D. G. SWAIM."

to the firm of Bright, Humphrey & Co., builders, etc., of Washington, D. C., and did thereupon knowingly and fraudulently seek through the said last-named firm to obtain from and compel payment by the said firm of Bateman & Co. of the amount of their said acknowledgement of July 15, 1882, thus attempting to commit a fraud upon the said Bateman & Co. This in Washington, in the District of Columbia.

Specification 2d. (Ruled out on demurrer.)

Specification 3d. "In that he, Brigadier General David G. Swaim, judge advocate general U. S. Army, having received by reference from the Secretary of War, at or about three o'clock p. m. of April 18, 1884, the following letters, dated, respectively, April 16 and 17, 1884, in words and figures as follows:

19

1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April 16th*, 1884.

To the Hon. Secretary of War:

DEAR SIR: It becomes my duty to prefer charges against Brigadier Gen. D. G. Swaim, at the head of the bureau of military justice

of the United States Army, for fraud and for conduct unbecoming an officer and gentleman.

I stand ready to prove that the said D. G. Swaim has committed a fraud, to all intents and purposes, upon the banking-house of Bateman & Co., of which I am a member.

Some two years ago the said D. G. Swaim, having deposited the sum of five thousand dollars, received, upon his departure for the West, a simple due-bill, at his request, to have in case an accident should befall him.

This amount was checked out subsequent to that date by said D. G. Swaim, for which we have a number of vouchers.

After having drawn all the money out and a settlement being made, he negotiated and transferred the due-bill for the full amount with certain parties in this city.

I am further ready to prove the said D. G. Swaim assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent and triplicates of outstanding accounts.

I ask that a court-martial be ordered for the trial of the said D. G. Swaim on charges preferred. I desire, when ordered, to amend this by presenting other charges under the head of conduct unbecoming an officer and a gentleman.

I am, sir, very respectfully, A. E. BATEMAN.

1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April 17th*, 1884.

To the Hon. Secretary of War:

DEAR SIR: The suit against our firm on the due-bill mentioned in my charges of yesterday against Gen. D. G. Swaim having been withdrawn and the differences between Gen. Swaim and myself satisfactorily settled, I hereby withdraw the charges contained in my letter of April 16th against said Gen. D. G. Swaim, he claiming they were made under a misapprehension of facts, which I concede.

Very truly yours, A. E. BATEMAN.

said reference being contained in the following indorsement placed upon the above-quoted letter of April 16th, in words and figures as follows:

WAR DEPARTMENT, *April* 18, 1884.

Respectfully referred to the judge advocate general for such remarks as he may desire to submit upon the allegations made in the within communication, and for any application he may desire to make.

ROBERT T. LINCOLN,
Secretary of War.

20 did return the said letter above deseribed to the Secretary of War at about four o'clock p. m. of the same day, viz., April 18, 1884, with an indorsement in words and figures as follows:

BUREAU OF MILITARY JUSTICE, *April* 18, 1884.

Respectfully returned to the Secretary of War. I had a bank account with Bateman & Co., and, besides, I loaned them five thousand dollars at 6 per cent. interest, for which they gave me an instrument reading: "Due D. G. Swaim, or order, five thousand dollars, value received. Bateman & Co., Washington, D. C., July 15, 1882." This is a negotiable promissory note, according to all the authorities on the subject, and was transferred in due course of business and payment demanded, but refused. Bateman & Co. claimed set-offs to the note, the correctness of which I denied. I endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect. The note was put in suit, but they now agree to refer the whole subject to an arbitrator, and with that view the suit has been withdrawn. The note (or due bill as it is incorrectly termed) is now in the possession of Bright and Humphrey, the endorsees thereof.

In regard to the fraudulent pay vouchers, the facts are as follows: Lieutenant Colonel A. P. Morrow, at the time a member of General Sherman's staff, a comparative stranger to me at the time, came to my office, in company with another officer, and requested me to advance him several months' pay on his pay accounts. I told him I did not do that kind of business, but in a friendly way referred him to brokers in the city doing such business, and named Bateman & Co., with others. I may have given him a note of introduction to that firm. I did not know for some time afterwards that Bateman and Co. had advanced money to Colonel Morrow on his pay accounts.

It will be seen that I had no concern or interest in these pay accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no other knowledge of any other pay-account transaction with Bateman & Co. The only request I have to make is that this statement may receive the same publicity that the within false accusations received.

D. G. SWAIM,
Judge Advocate General.

which said endorsement, by the said Swaim, was evasive, uncandid, and false, and calculated and intended to deceive the Secretary of War, especially in the following particulars:

First. In stating that he, Swaim, had a bank account with Bateman and Company and besides had loaned them five thousand dollars at 6 per cent. interest, whereas in truth and in fact he, the said Swaim, had had but one account with said firm, had not loaned them five thousand dollars, but had deposited what purported to be that amount, but which sum was actually but four thousand dollars, and he, the said Swaim, well knew at the time of making this statement in his said indorsement that said deposit had been credited to him in his said account and actually drawn against by him, the said Swaim.

Secondly. In that the said indorsement insufficiently and incorrectly described the said instrument of July 15, 1882, acknowledg-

ing said deposit, by omitting a material portion thereof, viz.,
21 the following words and figures: "Ten per cent. and interest
6 per cent.," so as to make said instrument appear to be a negotiable promissory note.

Thirdly. In that the said indorsement alleges that said instrument of July 15, 1882, was transferred in due course of business, whereas in truth and in fact he, the said Swaim, did only informally transfer the said instrument to the said firm of Bright, Humphrey and Company for the purpose of enforcing payment thereof, with the understanding that all expenses of collection or legal expenses incurred therein should be paid by him, the said Swaim.

Fourthly. In that the said indorsement states that "Bateman and Company claimed set-offs to the note, the correctness of which I (Swaim) denied," the fact being that the said Swaim had never presented and well knew he, Swaim, had never presented the said note or due-bill for payment to the said firm of Bateman & Co., and that no set-off had been claimed against it until it had been transferred to Bright, Humphrey & Co., and payment thereof demanded by them.

Fifthly. In that the said indorsement states "I (Swaim) endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect," whereas, in truth and in fact, he, the said Swaim, never presented said note or due-bill to said Bateman & Co. for payment or settlement, nor had he, Swaim, ever endeavored or requested to have it referred to arbitration.

Sixthly. In that the said indorsement states that "the note (or due-bill as it is incorrectly termed) is now in the possession of Bright, Humphrey & Co., the indorsees thereof," whereas, in truth and in fact, the said note or due-bill at the time of said indorsement was, and by the said Swaim well known to be, in the possession of Mr. Myron M. Parker, of Washington, D. C., in pursuance of a guarantee to that effect entered into and signed by the said Swaim on the previous day, viz., on April 17, 1884.

Seventhly. In that, referring to the application of Lieutenant Colonel Albert P. Morrow for an advance of money upon his pay accounts, the said Swaim states in the said indorsement that "I (Swaim) told him that I did not do that kind of business," whereas, in truth and in fact, the reason actually given by the said Swaim to the said Morrow for not advancing him money upon the security suggested was that he, the said Swaim, in consequence of other calls upon his pecuniary resources, had not then the money to spare. This at Washington, D. C.

Specification 4th. "In that he, Brigadier General David G. Swaim, Judge Advocate General U. S. Army, being cognizant of an arrangement or specific agreement by which certain bankers and brokers were to be reimbursed by Lieutenant Colonel Albert P. Morrow, 6th U. S. cavalry, for moneys advanced by them to the said Morrow, on certain fraudulent monthly pay accounts for sums pretended to be due said Morrow from the United States for his services as an officer of the army, of which fraudulent pay accounts for the same months had been sold by the said Morrow to said certain

bankers and brokers, and the value of said arrangement or specific agreement depending upon the said Morrow's escaping trial by general court-martial and punishment for the utterance of said fraudulent pay accounts, he, the said Swaim, on duty by virtue of his office and regardless of his peculiar relations to the administration of justice in the army, did threaten to use his official position
22 and his knowledge of the said fraudulent utterance of pay accounts and transactions hereinbefore mentioned so as to cause the dismissal of said Morrow from the army, or to otherwise impair the value of the securities given by the said Morrow to said bankers and brokers in furtherance with their arrangement with him to recover the sums advanced by them unless they, the said bankers and brokers, made provision for the payment of a claim held by him, the said Swaim, against the said Morrow for the sum of one hundred and fifteen dollars, this threat being made to Mr. A. E. Bateman, one of the parties in interest, and in the presence of Mr. Myron M. Parker, at the office of the said Parker, in the city of Washington, D. C., on or about August 1, 1884."

Charge II. "Neglect of duty, in violation of the 62d article of war."

Specification. "In that he, Brigadier General David G. Swaim, judge advocate general U. S. Army, having, by his introduction of Lieutenant Colonel Albert P. Morrow, 6th U. S. cavalry, to the firm of Bateman and Company, bankers and brokers, and by his personal representations to them, induced said firm to purchase certain pay accounts from the said Morrow for pretended sums due the said Morrow from the United States for his services as an officer of the army, and the said Swaim having been notified by Mr. A. E. Bateman, of said firm, that said pay accounts were fraudulent, in that they were duplicates or triplicates of pay accounts then outstanding, he, the said Swaim, being on duty by virtue of his office of judge advocate general of the army, did, nevertheless, fail to report the facts in the case to the proper authorities. This at Washington, D. C., on or about March 15, 1883."

To which charges and specifications the accused, Brigadier General David G. Swaim, judge advocate general U. S. Army, pleaded "not guilty."

Finding.

The court, having maturely considered the evidence adduced, finds the accused, Brigadier General David G. Swaim, judge advocate general U. S. Army, as follows:

Charge I. Of the 1st specification, "Guilty, except the words 'upon the understanding between the said parties that it was to serve,' and the word 'mere' and the words 'to the amount of thirty-three and $\frac{89}{100}$ dollars,' and the word 'such,' after the word 'only,' substituting for said word 'such' the word 'a;' and except also the words 'and fraudulently,' and substituting the word 'a' between the words 'compel' and 'payment;' and except the words 'of the amount of,' substituting therefor the word 'on,' and except the

word 'fraud,' substituting therefor the word 'wrong;' and of the excepted words not guilty."

Of the 3d specification, "Guilty, except the words 'and false,' and in the first subdivision of said specification except the word 'had,' substituting therefor the words 'at the time,' so that it shall read, where amended, as follows, viz: 'He, the said Swaim, had at the time but one account;' and, in the second subdivision, except the word 'material' and the words 'so as to make said instrument appear to be a negotiable promissory note;' and, except the
23 words of the third subdivision, to wit: 'Thirdly. In that the said indorsement alleges that said instrument of July 15, 1882, was transferred in due course of business, whereas, in truth and in fact, he, the said Swaim, did only informally transfer the said instrument to the said firm of Bright, Humphrey and Company for the purpose of enforcing payment thereof, with the understanding that all expenses of collection or legal expenses incurred therein should be paid by him, the said Swaim;' and, in the fourth subdivision, except the words 'until it had been transferred to Bright, Humphrey and Company and payment thereof demanded by them;' and, except the words of the sixth subdivision, to wit: 'Sixthly. In that the said indorsement states that "the note (or due-bill, as it is incorrectly termed) is now in the possession of Bright, Humphrey and Company, the indorsees thereof;" whereas, in truth and in fact, the said note or due-bill, at the time of said indorsement, was, and by the said Swaim well known to be, in the possession of Mr. Myron M. Parker, of Washington, D. C., in pursuance of a guarantee to that effect entered into and signed by the said Swaim on the previous day, viz., on April 17, 1884;' and, except the words of the seventh subdivision, to wit: 'Seventhly. In that, referring to the application of Lieutenant Colonel Albert P. Morrow for an advance of money upon his pay account, the said Swaim states, in the said indorsement, that "I (Swaim) told him I did not do that kind of business;" whereas, in truth and in fact, the reason actually given by the said Swaim to the said Morrow for not advancing him money upon the security suggested was that he, the said Swaim, in consequence of other calls upon his pecuniary resources, had not then the money to spare;' and of the excepted words not guilty."

Of the 4th specification, "Not guilty."

Of charge, "Not guilty; but guilty of conduct to the prejudice of good order and military discipline, in violation of the 62d article of war."

Charge II. Of the specification, "Not guilty." Of the charge, "Not guilty."

These findings leave the accused convicted of offenses described as follows:

Charge. Conduct to the prejudice of good order and military discipline, in violation of the 62d article of war.

Specification 1st. In that he, Brigadier General David G. Swaim, judge advocate general, U. S. Army, having, on or about the 15th day of July, 1882, deposited the nominal sum of five thousand dollars with the firm of Bateman and Company, bankers and brokers,

of Washington, D. C., of which said nominal sum one thousand dollars was represented by his, Swaim's, own check for that amount upon said firm, for which deposit he received an acknowledgment in writing in words and figures as follows:

"Due D. G. Swaim, or order, five thousand dollars, for value received.

"BATEMAN & CO.

"Washington, D. C., July 15th, 1882.

"Ten per cent. and interest 6 per cent."

which said acknowledgment was given by Bateman and Company and received by said Swaim as a memorandum of the deposit aforesaid, and the said Swaim having in the course of his business transactions with that firm reduced the balance remaining to his
24 credit therewith, and the said Swaim having subsequently duly received a statement of his accounts from said firm of Bateman and Company showing there had been credited to him the said deposit of five thousand dollars, and that there was then due him only a balance of thirty-three $\frac{8}{100}$ dollars, he, the said Swaim, did, nevertheless, thereafter, on or about February 15, 1884, duly assign and transfer the aforesaid written acknowledgment of July 15, 1882, by his indorsement thereon in words and figures as follows:

"Pay to Bright, Humphrey & Co., or order.

"D. G. SWAIM."

to the firm of Bright, Humphrey and Company, builders, etc., of Washington, D. C., and did thereupon knowingly seek, through the said last-named firm, to obtain from and compel a payment by the said firm of Bateman & Company on their said acknowledgment of July 15, 1882, thus attempting to commit a wrong upon the said Bateman and Company. This in Washington, in the District of Columbia.

Specification 3d. In that he, Brigadier General David G. Swaim, judge advocate general, U. S. Army, having received by reference from the Secretary of War, at about three o'clock p. m. of April 18, 1884, the following letters, dated, respectively, April 16 and 17, 1884, in words and figures as follows:

1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April 16th*, 1884.

To the Hon. Secretary of War.

DEAR SIR: It becomes my duty to prefer charges against Brigadier General D. G. Swaim, at the head of the bureau of military justice of the United States Army, for fraud and for conduct unbecoming an officer and gentleman. I stand ready to prove that the said D. G. Swaim has committed a fraud, to all intents and purposes, upon the banking-house of Bateman & Co., of which I am a member.

Some two years ago the said D. G. Swaim, having deposited the sum of five thousand dollars, received, upon his departure for the West, a simple due-bill, at his request, to have in case an accident should befall him.

This amount was checked out subsequent to that date by said D. G. Swaim, for which we have a number of vouchers.

After having drawn all the money out and a settlement being made, he negotiated and transferred the due-bill for the full amount with certain parties in this city.

I am further ready to prove that said D. G. Swaim assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent and triplicates of outstanding accounts.

I ask that a court-martial be ordered for the trial of the said D. G. Swaim on charges preferred. I desire, when ordered, to amend this by presenting other charges under the head of conduct unbecoming an officer and a gentleman.

I am, sir, very respectfully, A. E. BATEMAN.

25 1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April 17th*, 1884.

To the Hon. Secretary of War.

DEAR SIR: The suit against our firm, on the due-bill mentioned in my charges of yesterday against General D. G. Swaim, having been withdrawn and the differences between General Swaim and myself satisfactorily settled, I hereby withdraw the charges contained in my letter of April 16th, against said General D. G. Swaim, he claiming they were made under a misapprehension of facts, which I concede.

Very truly, yours, A. E. BATEMAN.

said reference being contained in the following indorsement placed upon the above-quoted letter of April 16th, in words and figures as follows:

WAR DEPARTMENT, *April 18th*, 1884.

Respectfully referred to the judge advocate general for such remarks as he may desire to submit upon the allegations made in the within communication, and for any application he may desire to make.

ROBERT T. LINCOLN,
Secretary of War.

did return the said letter above described to the Secretary of War at about four o'clock p. m. of the same day, viz., April 18, 1884, with an indorsement in words and figures as follows:

BUREAU OF MILITARY JUSTICE, *April 18th*, 1884.

Respectfully returned to the Secretary of War. I had a bank account with Bateman & Co., and, besides, I loaned them five thousand dollars at 6 per cent. interest, for which they gave me an instrument reading: "Due D. G. Swaim, or order, five thousand dollars, value received. Bateman & Co. Washington, D. C., July 15th,

1882." This is a negotiable promissory note, according to all the authorities on the subject, and was transferred in due course of business and payment demanded, but refused. Bateman & Co. claimed set-offs to the note, the correctness of which I denied. I endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect. The note was put in suit, but they now agree to refer the whole subject to an arbitrator, and with that view the suit has been withdrawn. The note (or due-bill as it is incorrectly termed) is now in the possession of Bright and Humphrey, the indorsees thereof.

In regard to the fraudulent pay voucher, the facts are as follows: Lieutenant Colonel A. P. Morrow, at the time a member of General Sherman's staff, a comparative stranger to me at the time, came to my office in company with another officer, and requested me to advance him several months' pay on his pay accounts. I told him I did not do that kind of business, but in a friendly way referred him to brokers in the city doing such business, and named Bateman & Co., with others. I may have given him a note of introduction to that firm. I did not know for some time afterwards that Bateman and Co. had advanced money to Colonel Morrow on his pay accounts.

26 It will be seen that I had no concern or interest in these pay accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no knowledge of any other pay-account transaction with Bateman & Co. The only request I have to make is that this statement may receive the same publicity that the within false accusations received.

D. G. SWAIM,
Judge Advocate General.

which said indorsement, by the said Swaim, was evasive, uncandid, and calculated and intended to deceive the Secretary of War, especially in the following particulars:

First. In stating that he, Swaim, had a bank account with Bateman and Company, and besides had loaned them five thousand dollars at 6 per cent. interest, whereas, in truth and in fact, he, the said Swaim, had at the time but one account with said firm, had not loaned them five thousand dollars, but had deposited what had purported to be that amount, but which sum was actually but four thousand dollars, and he, the said Swaim, well knew at the time of making this statement in his said indorsement that said deposit had been credited to him in his said account and actually drawn against by him, the said Swaim.

Secondly. In that the said indorsement insufficiently and incorrectly described the said instrument of July 15, 1882, acknowledging said deposit, by omitting a portion thereof, viz., the following words and figures: "Ten per cent. and interest 6 per cent."

Fourthly. In that the said indorsement states that "Bateman & Company claimed set-offs to the note, the correctness of which I (Swaim) denied," the fact being that the said Swaim had never pre-

sented and well knew he, Swaim, had never presented the said note or due-bill for payment to the said firm of Bateman & Company, and that no set-off had been claimed against it.

Fifthly. In that the said indorsement states "I (Swaim) endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect," whereas, in truth and in fact, he, the said Swaim, never presented said note or due-bill to said Bateman & Co. for payment or settlement, nor had he, Swaim, ever endeavored or requested to have it referred to arbitration.

The court sentenced the accused "to be suspended from rank, duty, and pay for the period of three years."

The foregoing findings and sentence having been considered by the President, the record of proceedings was returned to the court with the following remarks:

EXECUTIVE MANSION, *February* 11, 1885.

The record in the foregoing case of Brigadier General David G. Swaim, judge advocate general U. S. A., is hereby returned to the general court-martial before which the proceedings were had, for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the court in the first and third specifications under the first charge. The attention of the court
27 is invited to the accompanying communication of the Attorney General, under date of the 10th instant, whose views upon the matter submitted for reconsideration have my concurrence.

CHESTER A. ARTHUR.

The communication of the Attorney General was as follows:

DEPARTMENT OF JUSTICE, *February* 10, 1885.

SIR: Section 923 of the Regulations of the Army of the United States, under the title "Courts-martial" provides that:

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record, for the purpose of correcting or modifying any conclusions thereupon, and, also, to make any amendments of the record necessary to perfect it."

The record of the court-martial, including the finding and sentence of the court, in the case of Brigadier General David G. Swaim, judge advocate general U. S. A., has been transmitted to the President, for his action thereon, as provided by law.

General Swaim was tried upon two charges:

1st. "Conduct unbecoming an officer and a gentleman, in violation of the 61st article of war."

2d. "Neglect of duty in violation of the 62d article of war."

Of the second charge the court has found the accused not guilty. The first charge is accompanied by four specifications. The second of these specifications was ruled out on demurrer, and of the offenses set out in the fourth specification the court has found the accused not guilty. Of the offenses set out in the first and third specifications the court has (omitting certain phrases in the third, which were ruled out on demurrer) found the accused guilty, except as to certain words, phrases, and paragraphs which are stricken out, and with the substitution of certain other words and phrases intended to restrict and qualify the finding; and, in lieu of the charge "conduct unbecoming an officer and a gentleman, in violation of the 61st article of war," which these specifications were intended to support, the court has inserted the following: "Conduct to the prejudice of good order and military discipline, in violation of the 62d article of war."

That the court had the legal right to make such a finding is, I think, not open to doubt.

13th Attorney General's Opinions, 460.
Digest Opinions, Judge Advocate General, 264, 266.
De Hart's Courts-martial, 180–'5.
Ives' Military Law, 155.
Benét's Military Law and Courts-martial, 130, 132.
Harwood's Naval Courts-martial, 123, 224.

But whether, in view of the specific facts actually found by the court, it acted advisedly in thus refusing to find the defendant guilty of "conduct unbecoming an officer and a gentleman" and in substituting therefor the words "conduct to the prejudice of good order and military discipline" seems to admit of very serious doubt.

28 The first specification of charge I, contains a substantial allegation of an attempted fraud by the accused upon the banking firm of Bateman & Co. in the transfer by Swaim to a third party for the purposes of suit of a certain memorandum of deposit given by Bateman & Co. to Swaim on the 15th of July, 1882, said transfer being made after Swaim had, in the course of his business, withdrawn nearly the entire sum covered by the memorandum of deposit from said banking-house, "thus attempting to commit a fraud upon the said Bateman & Co." The court has found all the material facts as alleged in this specification, but in the clause last quoted has substituted the word "wrong" for "fraud," so that in the findings of the court the clause reads: "thus attempting to commit a wrong upon said Bateman & Co.;" and the finding further states in substance that what the accused did in this respect he did "knowingly."

If, as the court finds, the defendant did deliberately and with a knowledge of the facts seek, in the manner described, to perpetrate a "wrong" upon Bateman & Co., the line of distinction between the "wrong" which the court finds he sought to commit and the "fraud" which he was charged with seeking to commit is an exceedingly narrow one. Such a "wrong" deliberately planned and perpetrated would involve the same moral turpitude whether it were designated

as a fraud or as a wrong, and in either event the offense would seem to fall much more naturally and appropriately under the classification of "conduct unbecoming an officer and a gentleman" than in the category of offenses to the "prejudice of good order and military discipline." The evidence adduced upon this point may or may not satisfy the court of the immorality or dishonest intent of the accused in the particular acts described in this specification. If the court has reached the latter conclusion, then the accused is entitled to such a finding or verdict upon the specification as will indicate the absence of immoral or dishonest purpose, which the present finding does not. But, on the other hand, if the court is satisfied of such immoral or dishonest purpose, then it is difficult to understand why the facts should be glossed over by the use of the ambiguous word "wrong" or why the original charge of "conduct unbecoming an officer and a gentleman" should not be sustained.

The third specification charges the accused in substance with having prepared and forwarded to his official superior, the Secretary of War, a written statement in regard to the transactions referred to in the first specification and in regard to certain facts set out in two letters from A. E. Bateman to the Secretary of War, which statement by the said Swaim is charged to have been "evasive, uncandid, and false, and calculated and intended to deceive the Secretary of War." Then follows an enumeration of seven particulars wherein the said statement was false, evasive, and intended to deceive.

Of the substance of this specification the court has also found accused guilty. After reciting at length the letters of Bateman, their reference by the Secretary of War to Swaim, and the official indorsement thereon of the latter, the finding further proceeds: "which said indorsement by the said Swaim was evasive, uncandid, and calculated and intended to deceive the Secretary of War, especially in the following particulars."

In the succeeding enumeration of the particulars one has been found by the court exactly as charged, three have been found substantially as charged, and as to the remainder the accused has been found not guilty.

29 In the first branch of the finding upon the third specification above quoted it will be observed that the words "and false," as contained in the original specifications, are stricken out. In the enumeration of particulars, however, certain of the statements made by the accused in the indorsement in controversy are expressly found to have been false, as he, Swaim, "well knew," so that there is apparently no ground to assume that in striking out the words "and false" the court intended to acquit the accused of having made a false indorsement. The only inference I can derive from this action is that by striking out these words as applied to the indorsement as a whole and yet finding in terms certain specific falsehoods contained in said indorsement the court simply meant to negative the implication that the indorsement was false in every particular while at the same time indicating that, being a mixture

of truth and falsehood, it was as a whole "calculated and intended to deceive the Secretary of War."

However this may be, the court has in fact found the accused guilty of having presented to the Secretary of War a written indorsement containing certain specific statements which the accused knew to be false, and of having made such statements for the purpose and with the intention of deceiving the Secretary of War.

The finding of the court upon the specifications plainly shows this. Yet, at the same time, taken as a whole, in connection with the finding upon the charge, it would seem to indicate that in the opinion of the members of the court the offense thus established is not one which can properly be classified as "unbecoming an officer and a gentleman."

I find it difficult to reconcile this conclusion with any recognized standard of either officer-like or gentleman-like conduct; and it can only be so reconciled by annexing to the words "conduct unbecoming an officer and a gentleman," a narrow and very limited significance, in my judgment wholly incommensurate with the proper and reasonable import of those words.

It is not improbable that the argument upon this point of the learned and able counsel for the accused may have produced more than an ordinary impression upon the minds of the court. That argument was apparently intended to support the proposition that the charge of "conduct unbecoming an officer and a gentleman," under the 61st article of war, properly embraced only offenses of the grossest and basest character, of such a nature as to render the guilty party a moral and social outlaw. While it may be true that the position of the learned counsel has not been without some countenance I do not think it should receive the official sanction of the President of the United States. It should not be necessary to prove that an individual is a moral monstrosity in order to demonstrate his unfitness to be a trusted officer of the army.

Undoubtedly charges of mere indecorum should not be (and I believe they never are) made the basis of prosecution under the 61st article of war. The punishment annexed to a conviction under that article clearly indicates that prosecutions under it should be limited to the more serious class of offenses. But between the grossest offenses of which an officer may be guilty and which are not specially enumerated in the articles of war and those of a character simply prejudicial to "good order and military discipline," such as are apparently contemplated by the 62d article of war, there are intervening grades of offenses, many of which are in every proper sense of the words "unbecoming an officer and a gentleman," and the commission of which by any person is a sure indication that he is unfitted to hold an office of trust and honor in the military service.

The objection to the finding of the court in General Swaim's case is therefore based upon the obvious inconsistency between the findings of fact as contained in the specifications and the graduation of the offense in the substituted charge. The action of the court as a whole seems to involve a serious lowering of that high standard of

honor which from the earliest days has been the pride and the glory of our military service, and which was expressed on a memorable occasion by the great commander-in-chief of our Revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements."

The court in the present case has found the accused guilty of making certain false statements to the Secretary of War for the purpose of deceiving that officer. The President, as commander-in-chief of the army, should not concede that this offense is one either trivial in its nature or against good order and military discipline alone, nor as (in any sense of the words) other than as an offense "unbecoming an officer and a gentleman." If the evidence before the court-martial does not establish the facts in question beyond a reasonable doubt (upon which no opinion is here intended to be expressed) then General Swaim is clearly entitled to an acquittal upon this branch of the case. If, on the other hand, the evidence does establish these facts, then he is clearly shown to have committed an offense "unbecoming an officer and a gentleman."

In 1851 Brevet Brigadier General George Talcott, at the head of the ordnance bureau in the War Department, was tried by a court-martial upon three charges, the third being a charge of "conduct unbecoming an officer and a gentleman." Under this charge the specifications set forth, *inter alia*, the fact that the accused had made a written report and also verbal statements to the Secretary of War in regard to a certain transaction which "were false in fact and intent, and were made with design to deceive the said Secretary of War." This was the burden of the charge. The accused was found guilty, sentenced to be dismissed the service, and was dismissed. I recall this case merely to indicate the fact that untruthful statements made by a high military officer to the official head of the War Department have not been regarded in the past—as I think they should not be regarded in the future—as any less of an offense than one "unbecoming an officer and a gentleman."

I think the record in the case of Brigadier General David G. Swaim, U. S. A., may with propriety be referred back to the court-martial, with suggestions in the line above indicated, for further consideration and revision.

I have not undertaken to criticise in detail the great mass of testimony presented by the record in this case nor the propriety of the conclusions of the court as to the specifications established by it. Indeed it would be impracticable to do so intelligently without devoting many weeks' time to the examination of more than thirty volumes of the manuscript record. Moreover, the court which heard the witnesses was best qualified to scrutinize and balance
31 their testimony, possessing as it did the advantage of personal contact and observation, so essential in reaching a just conclusion from lengthy and conflicting statements. After the deliberate consideration given to the case by the court it is not unreasonable to assume that the specific facts found represent the truth of the case so far as it is ascertainable.

If the President should decide to approve the findings and sentence of the court as they now stand, I see no objection to the mere form of sentence. Article 101 of section 1342 of the Revised Statutes refers in express terms to suspension of pay, and it is apparently well settled (Digests Op. Judge Adv. Gen., 470) that such suspension of pay for a given period signifies its absolute forfeiture and not simply the temporary withholding thereof.

I am, sir, with great respect,

BENJAMIN HARRIS BREWSTER,
Attorney General.

The President.

The court, having reconsidered its previous action, adhered to its finding upon the first charge, remarking thereon as follows: "The court, upon mature reconsideration, has not found the accused guilty of such degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman, and has therefore respectfully adhered to its finding upon the first charge," but adjudged the following sentence:

"To be suspended from rank and duty for one year, with forfeiture of all pay for the same period, and at the end of that period to be reduced to the grade of judge advocate with the rank of major in the judge advocate general's department."

The record of proceedings having been submitted to the President, was again returned to the court for reasons set forth in the following indorsement placed thereon:

EXECUTIVE MANSION, *February 14th*, 1885.

The record in the foregoing case of Brigadier General David G. Swaim, judge advocate general United States Army, is hereby again returned to the general court-martial before which the proceedings have been had for a reconsideration of the amended sentence as set forth in the proceedings had upon reconsideration of the original findings and sentence.

It is apparent from the terms of the amended sentence that it was the intention of the court to award a punishment of greater severity and more nearly commensurate with the offenses of which the accused has been found guilty than was the penalty adjudged in the original proceedings; and if the terms of the amended sentence were such as could be legally carried out, the purpose of the court in that regard would have been accomplished. The provision, however, that the accused shall, after a suspension for the period of one year from rank and duty in the office now held by him, be placed in another office of lower rank in the department of which the office now held by him is a part, is one impossible of enforcement by the executive alone. That office of lower rank can only be filled in the method pointed out by the Constitution, namely, nomination by the President and confirmation by the Senate,
32 and then only in case of an existing vacancy. The amended sentence, in effect, creates an office and fills it, thus at once

embodying the exercise of legislative and executive functions, and the approving power of the Senate.

It is a necessary element of sentences of courts-martial that they shall, on approval of the appointing power, be capable of enforcement by the executive authority charged with that duty. So much of the amended sentence as relates to changing the accused from one office to another is not of that character. At the termination of the period of suspension indicated the accused could only be put into the office of a judge advocate in the manner hereinbefore indicated, and by a new commission, which he might accept or decline; but if there should be no vacancy, he could not be put into it at all, and his present office could not be filled until after it should have been vacated.

The constitutional power of the executive in filling vacancies cannot be restricted to individuals; and while the 62d article of war authorizes the court to exercise its discretion in awarding punishment, the discretion exercised must at least be bounded by the possibility of the sentence proposed being carried into effect without dependence on chance or a change in the laws.

CHESTER A. ARTHUR.

The court thereupon revoked its former sentence and adjudged as follows:

"To be suspended from rank and duty for twelve years and to forfeit one-half his montly pay every month for the same period."

II. The record of proceedings having been submitted to the President, the following are his orders indorsed thereon:

EXECUTIVE MANSION, *February* 24, 1885.

The opinion of the President as to the proper consequence of the findings of fact made by the court in the within record has already been given, and no further comment will be made upon the final sentence than to say that it is difficult to understand how the court could be willing to have the officer tried retained as a pensioner upon the army register while it expressed its sense of his unfitness to perform the duties of his important office by the imposition of two different sentences, under either of which he would be deprived permanently of his functions. The idea that an office like that of judge advocate general should remain vacant in effect for twelve years merely to save a part of its emoluments to its incumbent under such circumstances, would seem to come from an inversion of the proper relation of public offices and those holding them, and is an idea not suited to our institutions.

While holding the views now and heretofore expressed, it is deemed to be for the public interest that the proceedings in this case be not without result, and therefore the proceedings, findings, and sentence in the foregoing case of Brigadier General David G. Swaim, judge advocate general United States Army, are approved, and the sentence will be duly executed.

CHESTER A. ARTHUR.

By command of Lieutenant General Sheridan:

R. C. DRUM,
Adjutant General.

33 And the court, upon the claimant's request, finds the following additional facts:

VII.

A majority of the court-martial as organized for the trial of claimant was composed of colonels who were inferior in rank to him. A condition of peace existed at the time. The following were the general officers of the United States Army, with their stations:

Officers Who Held the Rank of Brigadier General, or Higher Rank, in the U. S. Army, on June 30, 1884, with Their Stations and Status at That Time as Shown by the Records of the Adjutant General's Office.

Officers in order of relative rank.	Status and stations.
Lieutenant General P. H. Sheridan	Commanding the army at Washington, D. C.
Major General W. S. Hancock	Commanding division of the Atlantic and department of the East, at Governor's island, N. Y.
Major General John M. Schofield	Commanding division of the Missouri, at Chicago, Ill.
Major General John Pope	Commanding division of the Pacific and department of California, at Presidio of San Francisco, Cal.
Brigadier General O. O. Howard	Station, Omaha, Neb. Absent in Europe.
Brigadier General A. H. Terry	Commanding department of Dakota, at Fort Snelling, Minn.
Brigadier General C. C. Augur	Commanding department of the Missouri, at Fort Leavenworth, Kans.
Brigadier General George Crook	Commanding department of Arizona, with station at Whipple barracks, Ariz. Absent at West Point, N. Y.
Brigadier General S. V. Benét	Chief of ordnance, Washington, D. C.
Brigadier General R. Macfeely	Commissary general of subsistence, Washington, D. C.
Brigadier General R. C. Drum	Adjutant general, Washington, D. C. Absent in Europe, July 22 to September 13, 1884.
Brigadier General W. B. Hazen	Chief signal officer, Washington, D. C.
Brigadier General N. A. Miles	Commanding department of the Columbia, at Vancouver barracks, Washington Territory.
Brigadier General D. B. Sacket	Inspector general. Station, Washington, D. C. Absent by authority of Secretary of War.
Brigadier General D. G. Swaim	Judge advocate general.
Brigadier General W. B. Rochester	Paymaster general, Washington, D. C.
Brigadier General S. B. Holabird	Quartermaster general, Washington, D. C.
Brigadier General Robert Murray	Surgeon general, Washington, D. C.
Brigadier General John Newton	Chief of engineers, Washington, D. C.
Brigadier General D. S. Stanley	Commanding department of Texas, at San Antonio, Texas.

34 VIII.

6. The claimant challenged the competency of a member of the court to sit on the trial for the cause stated, that claimant had se-

verely criticised, officially injured, and animadverted upon the conduct of such challenged member in official reports. The challenge to such member was overruled, and he sat upon the trial as the president of the court.

IX.

The judge advocate introduced and the court admitted a member of the bar to act as associate counsel to the judge advocate to assist in the prosecution of claimant before said court-martial without the sanction or authority of the convening officer of the court, and such person acted in all respects as the official judge advocate in presenting the case for the prosecution.

X.

Oral and secondary evidence of an account was received for the prosecution, when the books of original entries were at hand and available for the purpose.

XI.

In the trial of claimant upon said charges and specifications set out in said general court-martial orders No. 19 the prosecution introduced evidence tending to charge and convict him of the crimes of receiving commutation of quarters and forage for horses to which he was not entitled, and that he signed false certificates in drawing said commutation money for quarters and in making requisition for the said forage.

XII.

Claimant was not permitted to show the bad character of the principal witness for the prosecution.

XIII.

The court-martial refused to hear the testimony of a material witness for the defense on the ground that such witness neither
35 believed nor disbelieved in the existence of a supreme being; the testimony of such witness only being received in excluding him. (Evidence, pp. 208, 209, 215, 216.)

XIV.

The court-martial, having reached a finding and having thereupon sentenced claimant upon the charges promulgated in said general court-martial orders No. 19, and the reviewing officer having referred to the court for trial another set of charges, alleging fraud and conduct unbecoming an officer and a gentleman, under the 60th and 61st articles of war, as promulgated in general court-martial orders No. 20 of 1885; and the court-martial having heard all the evidence for the prosecution therein (except an absent witness, but with a statement as to what such witness would testify to), thus making a *prima facie* case against claimant, and he not having present a defense, the reviewing authority returned the case pro-

mulgated in said court-martial orders 19 to the court for reconsideration and a more severe sentence, with an opinion of the Attorney General hereinbefore set forth, which proceedings were with closed doors, and of which claimant had no notice at the time.

XV.

That one-half of claimant's pay and all his allowances are retained and withheld from him under and in pursuance of the third and last sentence adjudged against him, as hereinbefore set forth.

36 *Conclusions of Law.*

Upon the foregoing findings of fact the court decides as a conclusion of law—

That the petition of claimant should be dismissed.

IV.—*Opinion.*

NOTT, *J.*, delivered the opinion of the court:

The military trial which is now brought before the court by this civil action attracted great attention at the time, both from the high rank and prominent official position of the accused, and the unusual if not novel character of the proceedings by which the final result, the sentence of the court-martial was reached. We have considered the present case with deliberation commensurate with its great importance to the claimant and to the administration of military justice, and now announce the conclusions of this court.

When a person enters the military service whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights. He also submits himself to the administration of justice by military tribunals whose power extends to fines and forfeitures, to the deprivation of rank and pay, to imprisonment and even to punishment by death.

The proceedings of these military tribunals cannot be reviewed in the civil courts. No writ of error will lie to bring up the rulings of a court-martial. Even in the trial of a capital offence the various steps by which the end is reached cannot be made the subject of judicial review. The only tribunal that can pass upon alleged errors and mistakes is the commanding officer, charged with that responsibility, who, in cases like the present, must be the commander-in-chief, that is to say, the President. When the record of a court-martial comes into a civil court in a collateral way, the only questions which can be considered may be reduced to these three: 1st, was the court-martial legally constituted; 2nd, did it have jurisdiction of the case; 3rd, was the sentence duly approved and authorized by law.

Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal of their judgments, if it were sitting as an appellate court. But there is

always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter, the court must either give full effect to the sentence or pronounce it wholly void.

37 Among the objections which are now taken to the proceedings of the court-martial, are the following:

That officers inferior in rank to the claimant were appointed on the court when this could have been avoided.

That officers of known hostility to the claimant were selected and appointed as members of the court.

That a person was permitted to act as judge advocate who was not appointed or sworn as such.

That the court flagrantly violated the laws of evidence on the trial in a manner detrimental to the claimant.

That while the court-martial was in the midst of another trial in which the claimant was the accused, and while the evidence against him only was before the court, the court was required to reconsider this case, and under such prejudice to inflict another sentence.

If this court were sitting as an appellate tribunal in review of the proceedings of the court-martial these objections might be good assignments of error; but it is the opinion of the court that such errors cannot be reviewed collaterally, and that these do not affect the constitution of the court-martial, or its jurisdiction of the case before it, or the legality of the sentence which it pronounced.

There are, however, other objections raised which are more difficult in determination, and the first of these goes to the constitution of the court.

It is contended that "there was no law authorizing the appointment of the court-martial:" that is to say, "the appointment of a general court-martial" by the President "in time of peace for the trial of a general officer." The order convening the court runs in these words:

WAR DEPARTMENT, WASHINGTON, *June* 30, 1884.

By direction of the President a general court-martial is appointed to meet in this city at 11 o'clock a. m. on Wednesday, the 10th day of September, 1884, or as soon thereafter as practicable, for the trial of such persons as may be brought before it.

Then follows the detail of the members of the court, and the order is signed by the Secretary of War.

Before this the President had ordered a court of inquiry to investigate the matters alleged against the claimant, and after the coming in of the report the Secretary of War had ordered the recorder of the court of inquiry to prepare charges and specifications against the accused. Later the claimant was placed under arrest "by direction of the President" and ordered to report in person

before the court-martial for trial. Upon this record the claimant contends that the charges were, in effect, prefer-ed by the President; that the court was appointed and its members selected by the President; that the sentence was approved by the President, and that a court-martial thus instituted was unauthorized by law and its sentence wholly void.

But the question immediately to be considered does not extend to all of these official acts, and is indeed no broader than this, whether the President has authority to order a court-martial in any other case than the single instance prescribed by the 72nd article of war. This article at that time was in these words:

Any general officer commanding the Army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial either in time of peace or in time of war. But when any such commander is the accuser or prose-
cutor of any officer under his command the court shall be
38 appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case. (Rev. Stat., § 1342, art. 72.)

The contention of the claimant is that the President has no inherent power to appoint courts-martial; that the commander-in-chief of the Continental forces (which is a case cited by writers who maintain the contrary) did not assume to appoint such courts until expressly authorized by the Continental Congress; that the power exercised by the Crown at the time of the adoption of the Constitution, which, it has been supposed, was recognized by the framers of the Constitution when they expressly declared that the President shall be commander-in-chief of the land and naval forces, was not a power inherent or constitutional, an attribute of executive sovereignty, but was in fact derived from the mutiny acts and other statutes; and that an American court-martial is the creature of statute law, and all other methods of appointing general courts-martial are in effect excluded by the enactment of the methods provided by the 72d article of war. This position is fortified by much historical research and an elaborate and able argument.

Whether the power to order or appoint courts-martial is an inherent attribute of the President as commander-in-chief is, in the present condition of our laws, an abstract question which no court is at liberty to decide. An inherent attribute of an office established by the Constitution must exist without statutory authority, and cannot be taken away by statutory authority. If Congress by some legislative inadvertence should abolish all laws relating to courts-martial, without enacting others, there would then be a question whether the President could convene them as a necessary incident of his power of command and of his authority to maintain military discipline, on which the power to command rests. But no such condition of things now exists. Military offenses and their punishment are defined or regulated by statute, and jurisdiction concerning them is conferred upon these military tribunals. The practical and immediate question before the court is whether in the

present condition of the law the President had authority to convene this general court-martial to try this officer upon the charges actually preferred against him.

As has been said, the position of the claimant is that the President had power to appoint a court-martial only in the single instance named in the 72d article, as it then stood; and the lieutenant general (under whose immediate command the claimant was) not being his "accuser or prosecutor," a case had not arisen in which the President could so act. An elementary writer has also gone so far as to say:

Congress has the exclusive power of constituting military courts; it can declare how these courts are to be organized, their jurisdiction, by whom, and in what manner they are to be ordered, of whom they shall consist, their forms of proceeding; in fine, Congress has full and absolute power in all things pertaining to military tribunals, and the President can in no way interfere with matters relating to these tribunals except so far as he is expressly authorized. (O'Brien on American Military Law.)

It may be historically true that the commander-in-chief during the revolution ascribed his power to order courts-martial directly to the Continental Congress; and it may also be true that at the time of the adoption of the Constitution the annual consent of Parliament to the existence of a standing army was conditioned upon statutory provisions relating to such military tribunals, though
39 upon these historical questions the court expresses no opinion; but nevertheless there remains the significant fact in our military system that the President is always the commander-in-chief. Congress may increase the army, or reduce the army, or abolish it altogether; but so long as we have a military force Congress cannot take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power "to make rules for the government and regulation of the land and naval forces;" but the two powers are distinct; neither can trench upon the other; the President cannot, under the disguise of military orders, evade the legislative regulations by which he in common with the army must be governed; and Congress cannot in the disguise of "rules for the government" of the army impair the authority of the President as commander-in-chief.

It seems evident then to the court that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer cannot be invested with greater authority by Congress than the commander-in-chief, and a power of command devolved by statute on an officer of the army or navy is necessarily shared by the President. The power to command depends upon discipline, and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be "expressly" granted by Congress, then Congress by the simple

expedient of exclusively granting the authority to appoint courts-martial and approve sentences to a few officers of the army and tacitly ignoring the President could practically defeat the express declaration of the Constitution, and strip the office of commander-in-chief of all real powers of command.

The court cannot ascribe any such purpose to the legislation of Congress. Indeed, it seems evident to the court that if the 72nd article was enacted with the intent that the President should exercise no authority except in the single instance where it is withheld from commanding officers, and exclusively devolved on him, it would be necessary to ascribe an absurd purpose to this legislative enactment, viz: That the intent of the statute was that the general of the army and the lieutenant general should be exempt from punishment. If, for illustration, in 1884 the lieutenant general had stood in the place of the judge advocate general, how could he have been court-martialed? He certainly could not have appointed his own court-martial and ordered himself before it. A general commanding a military department could not have done so, because the lieutenant general was not in his department or under his command. The President could not have appointed the court because the 72nd article only requires, or, if it be preferred, authorizes him to do so in those cases where a "general officer commanding the Army of the United States, a separate army, or a separate department," is "the accuser or prosecutor of any officer under his command." The lieutenant general, therefore, would have been exempt from punishment so long as punishment depended upon a trial by court-martial.

It also appears by the first articles of war enacted after the adoption of the Constitution, those of 1806 (act 10th April, 1806,
40 2 Stat. L., p. 359, art. 65), that while general officers commanding an army or colonels commanding a department were authorized to appoint courts-martial, no provision whatever was made for courts to try these commanding officers. It is incredible that Congress intended that such officers should be exempt from trial by court-martial; and as the same statute (sec. 3) declared void the preconstitutional articles of war which placed this power exclusively in "the general officer commanding the troops," it seems to the court manifest that Congress supposed that the Constitution supplied the need of an express statutory authority to the commander-in-chief. Since the earliest legislation of our Government it has undoubtedly been understood and intended that whatever powers were granted to general officers in regard to courts-martial were at the same time granted and intended to be shared by the President.

The legislative history of courts-martial renders the legislative intent still clearer.

At the time of the adoption of the Constitution, the articles of war in force were those of May 31, 1786. They provided that "general courts-martial shall be ordered as often as the case may require by the general officer commanding the troops."

"An act to recognize and to adapt to the Constitution of the United

States the establishment of the troops raised under the resolves of the United States in Congress assembled, and for other purposes therein mentioned," is the first statute establishing rules for the government of the army after the adoption of the Constitution. It provides:

SEC. 4. And be it further enacted, That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war as may hereafter by law be established. (Act September 29, 1789, 1 Stat. L., p. 95.)

"An act for regulating the military establishment of the United States," passed a few months later is to the same effect:

SEC. 13. And be it further enacted, That the commissioned officers, noncommissioned officers, privates, and musicians aforesaid shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, as far as the same may be applicable to the Constitution of the United States, or by such rules and articles as may hereafter by law be established. (Act May 26, 1790, 1 Stat. L., p. 119.)

"An act for establishing rules and articles for the government of the armies of the United States," contains the first articles of war framed after the adoption of the Constitution, and the article authorizing courts-martial is in these words:

Article 65. Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. (Act April 10, 1806, 2 Stat. L., p. 359.)

Not until 1830 did the President come into a statute relating to courts-martial, and the enactment is plainly restrictive of the preceding legislation—it is to limit the authority of commanding officers—not to confer power upon the President:

"An act to alter and amend the sixty-fifth article," &c.: Be it enacted, That whenever a general officer commanding an army, or a colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the Army of the United States under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States. (Act May 29, 1830, 4 Stat. L., p. 417, sec. 1.)

41 The foregoing statutes were gathered together by the Revised Statutes, but with some changes in substances, and formed the article before quoted under which the President acted in this case. Finally the act of July, 1884, carried the article back to its original purpose and left it as follows:

Art. 72. Any general officer commanding an army, a territorial division, or a department, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the

President for his approval or orders in the case. (Act July 5, 1884, 23 Stat. L., p. 121.)

It is said that courts-martial are the creatures of statute law. But so also are regiments. There can be no standing army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant colonel, a major, or any other officer, but when Congress so enact they, without words to that effect, likewise place the command in the commander-in-chief. His name is to be understood as written in every statute which confers upon a military officer military authority.

We come now to a more difficult part of the case—the question whether the sentence of this court-martial was authorized by law.

The charge against the claimant was "conduct unbecoming an officer and a gentleman;" and the charge rested on the averment that the claimant had defrauded or attempted or intended to defraud a firm of private bankers in Washington, doing business in the name of Bateman & Co. The specifications are long, containing much detail and matter that under ordinary rules of pleading in civil suits would be deemed argumentative and inferential; but the question of guilty or not guilty comes back to the fraud or attempted fraud upon Bateman & Co. If no fraud was committed, or attempted or intended to be committed, there was no ground primarily for the charge. The matter was brought before the Secretary of War by a letter from one of the firm, in which he says: "It becomes my duty to prefer charges against Brig. Gen'l D. G. Swaim, at the head of the bureau of military justice of the United States Army, for fraud," &c. "I stand ready to prove that the said D. G. Swaim has committed a fraud," &c. "I am further ready to prove the said D. G. Swaim assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent," &c.

As to this last charge, assisting to negotiate army pay vouchers which he knew to be fraudulent, it is now virtually out of the case, for upon it the claimant was found not guilty.

When these charges of Bateman were laid before the Secretary of War, he referred the communication to the claimant for explanation. The last charge certainly was a serious one, and being connected with a public scandal highly prejudical to the honor of the army, merited the closest scrutiny of the Secretary of War. The answer of the claimant to it was one which might have been satisfactory to one person and not to another. It briefly narrates the claimant's part in the transactions of the delinquent officer; it disavows in substance any part in the fraud, but it concedes that the officer came to the claimant to procure an advance of "several months' pay on his account," and that he, the claimant, gave him a letter of introduction to Bateman & Co., "in a friendly way." It does not give
the name of an officer who was a witness of the claimant's
42 part in the transaction, nor call for the production of the
letter which he gave, nor set forth an explicit denial of the charge, nor demand an investigation, if his explanation should not be satisfactory to the Secretary of War. Moreover, the charges of Bateman dated the 16th April, 1884, were published by him in the

newspapers of that same day, and the claimant instead of bringing an action of libel against him or otherwise resenting the infamous charges which had been both made and published, immediately sought him, and effected a settlement on the day after their publication, and Bateman at the same time, April 17th, sent a second communication to the Secretary of War, in which he said:

1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April* 17, 1884.

To the Hon. Secretary of War.

DEAR SIR: The suit against our firm, on the due-bill mentioned in my charges of yesterday against General D. G. Swaim, having been withdrawn and the differences between General Swaim and myself satisfactorily settled, I hereby withdraw the charges contained in my letter of April 16th against said General D. G. Swaim, he claiming they were made under a misapprehension of facts, which I concede.

Very truly, yours, A. E. BATEMAN.

The Secretary of War was fully justified, in the opinion of the court, in bringing the matter to the personal attention of the President, if only because of the peculiar position of the accused as judge advocate general of the army; and the President was fully justified in ordering it to be investigated by a court of inquiry, and upon the report of that court in ordering charges to be preferred, and the claimant to be tried by court-martial. It was possible that Bateman & Co., and the claimant by mutual explanations could clear up a business misunderstanding and in good faith arrived at a conclusion not discreditable to either; but it was not possible that a settlement of their business differences could efface from the records of the War Department the averment that Bateman "was ready to prove" that the judge advocate general had assisted in negotiating vouchers "which he knew to be fraudulent."

Nevertheless, with this last charge taken out of the case by the acquittal of the accused, it must be remembered that the serious offense of conduct unbecoming an officer and a gentleman depended upon the question of a fraud perpetrated or attempted upon Bateman & Co. by the claimant. The specifications do indeed aver that his reply to the Secretary of War was "evasive, uncandid, and false, and calculated and intended to deceive the Secretary of War." But the falsity of the reply depended upon the fraud charged in the first specification. If there was a fraud practiced upon Bateman & Co., then the reply was false; if there was no fraud practiced, there was little or nothing to be false about.

It is manifest that the court-martial intended to find and found that no fraud had been practiced or attempted, and when that conclusion was reached the charge of conduct unbecoming an officer and a gentleman fell, and upon it the court properly found the accused not guilty. But as in criminal law a jury may convict the prisoner of a lesser offence of the same nature than that charged in the indictment, as of manslaughter where the indictment is for

murder, so in military law, a court-martial may find the accused guilty of a lesser offence than the principal charge, if it be covered by and be within the scope of the specifications. Ac-
43 cordingly in this case the court found the accused guilty of many acts alleged in the specifications and formulated them under the "charge, conduct to the prejudice of good order and military discipline, in violation of the 62d article of war."

It is always embarrassing to a civil court when it must leave its own field of statutes and judicial authorities, and found a judgment upon the unwritten codes of military ethics and military administration. In the recent case of Fletcher (26 C. Cl's R., 541, 562), where the court was obliged to pass upon the legality of a sentence for conduct unbecoming an officer and a gentleman, resting upon a series of acts which neither civil nor criminal jurisprudence would have stigmatized as fraudulent, it was said:

It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, "His moral horizon was limited by the civil code of Tennessee." We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum*; but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum*. In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the army shall come down to the requirements of a criminal code.

So in the present case, the court is obliged to pass upon acts which transgress no statute or rule of the common law, and yet which may constitute the military offense of conduct to the prejudice of good order and military discipline. The articles of war do not define either of these offences, nor can a court of law. What is conduct unbecoming an officer and a gentleman, or what is conduct to the prejudice of good order and military discipline is beyond the bounds of exact formula, and must depend more or less upon the circumstances and peculiarities of each case. To slap a woman in the face is no more violation of the law than to slap a man in the face. Yet under the code of military ethics, to slap a woman in the face might be regarded as a cowardly act and be classified as conduct unbecoming an officer and a gentleman. To commit an assault on any person is an offence at law; but under the other code, not to commit an assault, as where a ruffian was insulting an unprotected girl, might be deemed conduct unbecoming an officer and a gentleman. The cases which involve conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measur-

able by our in-ate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties. All that a civil court can do in these collateral cases is to look into the record and see that the wide discretion which the articles of war give to a court-martial and the commanding officer who approves the sentence has not been abused; that the sentence does not rest on supposititious or frivolous pretexts; that the case presents facts which a body of experienced, intelligent, impartial, military experts may reasonably hold, in the exercise of a sound discretion, to be prejudicial to good order and military discipline. When such facts appear, the civil court must concede that they constitute the offence embodied in the charge.

44 On looking into the record in the present case we find legal references and conclusions which do not seem to be warranted by the facts found, and matters of which the claimant was adjudged guilty that certainly cannot affect directly or indirectly the good order or military discipline of the army. The court-martial refused to find that the claimant attempted to commit a "fraud" upon Bateman & Co., and substituted for "fraud" the word "wrong;" but the findings show that he had deposited money with Bateman & Co. as bankers and received a statement of his accounts setting forth that he had been credited with "the said deposit;" and that they at the same time had given to him an instrument which has been variously called by Bateman a "due-bill" by the claimant a "negotiable promissory note" and by the court-martial an "acknowledgment as a memorandum of the deposit," which was in these words:

Due D. G. Swaim, or order, $5,000 for value received.

BATEMAN & CO.

Washington, D. C., July 15th, 1882.
Ten per cent. and interest 6 per cent.

The findings further show that the claimant "in the course of business transactions with that firm reduced the balance to his credit" until there "was due him only a balance of $33.89" when he transferred and assigned the instrument "to the firm of Bright, Humphrey & Company, builders, etc., of Washington," "and did thereupon knowingly seek through the said last-named firm to obtain from and compel a payment by the said firm of Bateman & Company on their said acknowledgment," "thus attempting to commit a wrong upon the said Bateman & Company." The findings do not show that this instrument was commercial paper by mercantile usage in the District of Columbia, nor that it passed to Bright, Humphrey & Co. as negotiable paper—in good faith, before it had become due, and for a present consideration; nor do they show that the claimant was insolvent and unable to respond to Bateman & Co. in whatever damages they might recover for their alleged advances to him. Therefore, according to the findings, Bright, Humphrey & Co. acquired no greater right or equity than the claimant himself possessed, and whatever defence could be set up as against him, could be set up as against them.

Inasmuch, then, as there was a balance remaining due to the

claimant, and (as the court found) the purpose of the assignment was "to obtain from and compel a payment by Bateman & Co. on their said acknowledgment;" and inasmuch as the claimant had an unquestionable legal right to compel such a payment, and Bright, Humphrey & Co. could compel nothing more, this court is unable to perceive that a "wrong" could have been done by the assignment. If the claimant had sold the instrument to Bright, Humphrey & Co. upon assurances that the whole amount named in it remained unpaid, a wrong would have been done that firm. But no such charge was preferred against the claimant, nor do the findings of the court show that Bright, Humphrey & Co. ever complained. These remarks are not intended as criticism of the court-martial. A military court does not find in an involved case like this a general verdict like that of a jury on an indictment, nor a special verdict of the material facts established by the evidence such as is sometimes found in civil cases. It labors under the great inconvenience of having to travel through every specification, line by line and word by word, and find whether the facts alleged did or did not occur. In the present case the court found the accused "not guilty" as to a single word. Moreover the findings of a court-martial take the form of "guilty" or "not guilty" and may adjudge in form that the accused is guilty of an act which was in itself innocent.

But while the court has carefully discarded all matters in the findings which cannot, in its opinion, constitute an offense, it still appears that the claimant had prolonged and involved business transactions with these bankers not altogether consistent with the duties of his most responsible military position; that these transactions were so conducted as to require a lawsuit to bring them to an end, and to subject him to public charges of fraudulent practices; that while under these charges he withdrew the suit against the party who made them, apparently in consideration of his withdrawing his charges against the claimant; that when the letters charging the fraud and withdrawing the charge were referred to him for explanation he neglected to clear up the matter, and on the contrary gave an explanation which was uncandid and evasive, compelling the Secretary of War to take further steps toward removing the shadow which had fallen upon the reputation of the army, and involving the Government in the expenses and inconveniences of a court of inquiry and a court-martial; that when an officer of whom he knew little or nothing came to him to raise money on his pay accounts for months in advance, he introduced him to his own bankers apparently without words of caution and directly aided and countenanced a practice which must seriously interfere with an officer's freedom of action and military efficiency. This court cannot say that these acts were not prejudicial to good order and military discipline; and accordingly must hold that they are sufficient to uphold the charge.

We now come to the most complex and difficult question of the case, a question concerning which the court has entertained serious doubts that prolonged deliberation has not wholly removed.

The question of fraud being out of the case, and the court-martial having properly acquitted the claimant on the charge of conduct unbecoming an officer and a gentleman, imposed this sentence, "To be suspended from rank, duty and pay for the period of three years." The record then went to the President and was by him referred to the Attorney General.

On the 11th February, 1885, the President returned the record to the court-martial "for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the court in the first and third specifications under the first charge." The President also communicated to the court the opinion of the Attorney General, "whose views," he added, "upon the matter submitted for reconsideration have my concurrence."

In this opinion the Attorney General regards the facts found as being equivalent to those charged in the specifications, and he sternly censures the result reached in the sentence. After reviewing the action of the court, he says:

The objection to the finding of the court in Gen. Swaim's case is therefore based upon the obvious inconsistency between the findings of fact as contained in the specifications and the graduation of the offense in the substituted charge. The action of the court as a whole seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and glory of
our military service, and which was expressed on a memorable
46 occasion by the great commander-in-chief of our revolutionary armies, when reluctantly compelled to reprimand a brother officer, in these words: "Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements."

It is manifest that the Attorney General did not clearly apprehend the position taken by the court-martial; that he did not perceive that the claimant's evasive and uncandid action, no matter how described, was something less than and different from the positive offense of fraud. He intimates in his opinion that there is no difference between an intent to perpetrate a "wrong" and an intent to perpetrate a "fraud;" and he fails to observe that the court-martial had carefully sifted out of the speci-cations the element of fraud which was the gravamen of the charge, "conduct unbecoming an officer and a gentleman."

The court-martial, notwithstanding the strictures of the Attorney General, properly adhered to its determination that the facts found did not constitute the offense charged, but it imposed a second sentence upon the accused, the language of which is as follows: "The court upon mature reconsideration, has not found the accused guilty of such degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman, and has therefore respectfully adhered to its findings upon the first charge." But the court imposed the following sentence:

To be suspended from rank and duty for one year, with forfeiture of all pay for the same period, and at the end of that period to be

reduced to the grade of judge advocate with the rank of major in the judge advocate general's department.

This sentence the President likewise disapproved. He says:

It is apparent from the terms of the amended sentence that it was the intention of the court to award a punishment of greater severity and more nearly commensurate with the offenses of which the accused has been found guilty than was the penalty adjudged in the original proceedings, and if the terms of the amended sentence were such as could be legally carried out, the purpose of the court in that regard would have been accomplished. The provision, however, that the accused shall, after a suspension for the period of one year from rank and duty in the office now held by him be placed in another office of lower rank in the department of which the office now held by him is a part, is one impossible of enforcement by the executive alone. That office of lower rank can only be filled in the method pointed out by the Constitution, namely, nomination by the President and confirmation by the Senate, and then only in case of an existing vacancy. The amended sentence, in effect, creates an office and fills it, thus at once embodying the exercise of legislative and executive functions, and the approving power of the Senate.

In the opinion of the court-martial the change of position imposed by the sentence was one of rank; in the opinion of the President it was one of office.

The court a third time deliberated and then imposed the sentence which was approved by the President and carried into execution and which the claimant now attacks. It is—

To be suspended from rank and duty for twelve years and forfeit one-half his monthly pay every month for the same period.

The articles of war designate many offenses, such as murder, treason, larceny, robbery, burglary, arson, desertion, bribery, cowardice, drunkenness on duty, sleeping upon a post, disobedience of orders, disorderly conduct in quarters, irreverent conduct in church, profanity, etc., etc. The legislative authority then gathers up the non-enumerated, indefinable offenses of a military life and places them under the titles of conduct unbecoming an officer and a gentleman and conduct prejudicial to good order and military discipline.

47 That this is the well-understood purpose and effect of the article of war last referred to all military writers agree:

This provision, taken originally from the British military law, was in substance incorporated in our first code of 1775, and has similarly appeared in each subsequent issue of our articles of war. As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offenses not expressly made cognizable by courts-martial in the other and more specific articles, and thus to prevent the possibility of a failure of justice in the army. In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this the "general" article of the code. Wherever the offense committed is one not certainly, or fully, designated or described in some other

particular article, or where, though so designated, no punishment is assigned for its commission, or where it is doubtful under which of two or more articles the offender should be prosecuted, recourse is had to this comprehensive and serviceable provision as the authority and foundation for the charges and proceedings. (Winthrop's Military Law, vol. 1, p. 1035.)

Its policy is to provide a general remedy for a wrong which had not elsewhere been provided for. (Samuel, Military Law, p. 688 (1816).

There is scarcely any impropriety of conduct or irregularity which an officer or soldier may commit that may not be brought under the 70th article of war. Kennedy, Military Law, p. 34 (1847).

The seventieth article of war is the most useful of the whole. Napier, Remarks on Military Law, p. 59 (1837).

There are many offences which the soldier and officer may commit and many omissions of which they may be guilty, which it would be impossible to distinctly lay down in separate articles of war. * * * Hence it is that this article is resorted to under which the sins of commission and of omission are tried and punished. The punishments are discretionary. Hough, Precedents in Military Law, p. 270 (1855).

This article is intended to be supplementary to all the others and to provide a general charge under which every possible kind of offence, not provided for, may be ranged. Coppée, Field Manual of Courts-martial, p. 88 (1863).

Clode (Military and Martial Law), pp. 12, 18, and 40 (1874), refers to it as the Devil's article. On page 12 he says: "That article which the soldiers called the Devil's article, viz: for punishing indefinitely crimes for which no special order had been set down."

The purpose and reason of our existing statutory provisions are well expressed in the earliest article of war concerning minor offences:

All other faults, disorders, and offences not mentioned in these articles shall be punished according to the general customs and laws of war. (Articles of the Earl of Essex, 1642. Winthrop's Military Law, vol. 1, p. 1035).

It is, then, well settled that courts-martial have jurisdiction of minor military offences and irregularities, and that the punishment therefor is lodged in their discretion. But it is also well settled that this discretion, though unrestricted in terms, must be exercised within reasonable limits; that only minor punishments can be inflicted for minor offences (Dynes *v.* Hoover, 20 How., 65). Indeed, the principles of our existing military law is not inaptly set forth in the articles of James II:

All other faults, misdemeanors, and disorders not mentioned in these articles shall be punished according to the laws and customs of war, and discretion of the court-martial; provided, that no punishment amounting to the loss of life or limb be inflicted upon any offender in time of peace, although the same be allotted for the said offence by these articles and the laws and customs of war. (Winthrop's Military Law, vol. 1, p. 1035.)

A court-martial, therefore, in a case of these non-enumerated, undefined, minor offences is entrusted with the triple discretion of determining whether the acts proved are prejudicial to good order and military discipline, and of determining the gravity, seriousness, and degree of the offence, and of imposing an appropriate punishment.

It must also be borne in mind that a commanding officer charged with the duty of reviewing the proceedings of the court can-
48 not increase the severity of a sentence. He may approve or disapprove or mitigate, but he cannot impose a new sentence of a more severe character.

The Attorney General grounded his advice to the President upon the army regulation which provides that:

When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to affort it an opportunity to reconsider the record, for the purpose of correcting or modifying any conclusions thereupon, and also to make any amendments of the record necessary to perfect it. (Army Regulations, 1881, sec. 923.)

But it is clear to the court that a regulation, as its name imports, is to regulate and guide proceedings under the law and not to make or override the law. The purpose of this regulation is well illustrated in the proceedings which followed the second sentence—that is, where a court-martial has inadvertently imposed a sentence impossible of execution, to bring the obstacle to the attention of the court so as to enable it to correct its error. The regulation was not intended to confer upon the reviewing officer power to interfere with the proper discretion of a court, or to require it to do that which he could not himself do—increase the severity of a sentence.

The question presented by the case is believed to be a new one unless it be identical in legal effect with that which was before the Supreme Court in *Ex parte* Reed (100 U. S. R., 13). In that case there was an unequivocal offenso involving no discretion on the part of the court, viz: "malfeasance in the discharge of his official duty." In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offence; and if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court; in both cases the reviewing officer disapproved of the leniency of the sentence; and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case, and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed did not leave it

free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient, in effect compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom; and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law.

But while the last principle is a sound one which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in *Ex parte* Reed is conclusive upon this branch of the case.

The sentence of the court-martial was approved by the President and carried into execution on the 24th February, 1885. This action was brought on the 24th February, 1891. That is
49 to say, the claimant waited until half of his sentence had expired and until the last day before the statute of limitations would bar a part of his demand, during which period he rendered no service whatever, and then brought an action for the forfeited portion of his pay.

In Ide's case (25 C. Cls., 401), where an officer erroneously dismissed did nothing for an unreasonable length of time, it was held that he had acquiesced in the order dismissing him, and abandoned the office. In Hildeburn's case (13 *id.*, 62), where an officer had been mustered out as a supernumerary and had accepted the benefits given to such officers (one year's pay without service), it was held to be a conclusive admission, and that he could not then contest the legality of his discharge. But the court is of the opinion that there is a distinction between those cases and the present one, inasmuch as all relations between the Government and the officer were there severed, or intended to be severed, while here the sentence retains the officer in the service, keeping him amenable to military law. It is thought by the court that while these relations continue his inaction does not preclude him from questioning the legality of his sentence.

Upon the question whether the claimant is entitled to recover allowances under the terms of his sentence, upon the ground that only half of his monthly pay was ordered to be forfeited, the court is of the opinion that where an officer is suspended from duty he is not entitled to allowance.

The judgment of the court is that the petition be dismissed.

50 V.—*Final Judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 27 day of February, A. D. 1893, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimant's petition be dismissed.

51 VI.—*Claimant's Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 27 day of February, A. D. 1893, in favor of defendant, the claimant, on the 16 day of May, 1893, makes application for and gives notice of an appeal to the Supreme Court of the United States.

D. G. SWAIM,
Judge Advocate General, Claimant.

Filed and allowed in open court May 16, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

52 VII.

In the Court of Claims.

DAVID G. SWAIM
vs.
THE UNITED STATES. } No. 16889.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the application of claimant for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 8th day of June, A. D. 1893.

ARCHIBALD HOPKINS,
Chief Clerk, Court of Claims.

Endorsed on cover: Case No. 15,331. Court of Claims. Term No., 947. David G. Swaim, appellant, *vs.* The United States. Filed June 9, 1893.

165-553.

Office Supreme Court, U. S.
FILED.
OCT 3 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896

No. 587.

DAVID G. SWAIM, APLELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

DAVID G. SWAIM,
Judge Advocate General, U. S. A., Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 537.

DAVID G. SWAIM, APLELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

1.

The appellant, David G. Swaim, was on the 21st day of February, 1881, duly appointed and commissioned and ever since has been Judge Advocate General of the Army of the United States. (Rec., p. 5.)

2.

This action was brought by appellant in the Court of Claims to recover pay and allowances withheld from him

in pursuance of the sentence of an alleged general court-martial convened and conducted under the following state of facts:

1. During the years 1881, '2, '3, '4, one A. E. Bateman was conducting a banking and brokerage business in the city of Washington, D. C. (Rec., p. 8.)

2. In 1882 J. Stanley Brown was interested as a member of the firm of Bateman & Co., and in May of that year, for the purpose of increasing his interest in the business, borrowed of appellant $5,000, for which sum Brown gave his note and agreed, while he kept said money, to pay to appellant 10 per cent. of the net profits accruing to Brown. Appellant had an account with said firm of Bateman & Co. (Rec., p. 8.)

3. In July, 1882, Brown withdrew from the firm of Bateman & Co., and by an arrangement then made Bateman & Co. assumed the debt of Brown to appellant of $5,000 and gave appellant a note or due bill for the same as follows: "Due D. G. Swaim or order five thousand dollars, value received. Signed Bateman & Co., Washington, D. C., July 15, 1882. Ten per cent. and interest 6 %." (Rec., p. 14.)

4. Bateman & Co. bought and sold certain stocks for appellant, and they differed as to what was the correct state of the account between them. No settlement was reached. Appellant in February, 1884, assigned the note or due bill to Bright, Humphrey & Co., who were building a house for him, with instructions to bring suit, if necessary, to recover what was due and to credit the amount so realized to appellant. Thereupon the firm of Bright, Humphrey & Co. presented said note or due bill and demanded payment of the amount due thereon, which was refused, and thereupon suit was brought on said note. (Rec., p. 9.)

5. On the institution of said suit, to wit, April 16, 1884, Bateman addressed a communication to the Secretary of War charging appellant with having committed a fraud, to all intents and purposes, on the house of Bateman & Co., the nature of which he falsely described as follows:

"Some two years ago said D. G. Swaim, having deposited the sum of $5,000, received upon his departure for the West a simple due bill at his request to have in case an accident should befall him. This amount was checked out subsequent to that date by said D. G. Swaim, for which we have a number of vouchers. After having drawn all the money out and a settlement being made, he negotiated and transferred the due bill for the full amount with certain parties in this city." (See full letter, Rec., pp. 14, 15.)

6. At the earnest solicitation of M. M. Parker, who came to appellant the following morning, April 17, 1884, appellant was induced to agree to refer the matters in dispute to Hon. Benjamin Butterworth for arbitration and adjustment, and thereupon Bateman addressed a letter to the Secretary of War withdrawing his charges, conceding that they had been made under a misapprehension of facts. (See full letter, Rec., p. 15.)

7. On the 18th of April, 1884, the Secretary of War referred Bateman's said letters to appellant, as Judge Advocate General, marked special, "for such remark as he may desire to submit upon the allegations made in the within communication and for any application he may desire to make." Appellant on the same day returned the said letters, with the following endorsements made thereon:

Respectfully returned to the Secretary of War. I had a bank account with Bateman & Co., and, besides, I loaned them five thousand dollars at 6 per cent. interest, for which they gave me an instrument reading: "Due *D. G. Swaim* or order five thousand dollars, value received. Bateman & Co. Washington, D. C., July 15, 1882." This is a negotiable promissory note, according to all the authorities on

the subject, and was transferred in due course of business and payment demanded, but refused. Bateman & Co. claimed set-offs to the note, the correctness of which I denied. I endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect. The note was put in suit, but they now agree to refer the whole subject to an arbitrator, and with that view the suit has been withdrawn. The note (or due bill, as it is incorrectly termed) is now in the possession of Bright and Humphrey, the endorsees thereof. (See full endorsement, Rec., p. 16.)

8. The Secretary of War, four days after the receipt of appellant's said endorsement and without further communication with appellant, on, to wit, the 22d of April, 1884, addressed a letter to the President, quoting therein the above correspondence and commenting unfavorably on the brevity of appellant's said statement of facts and recommended the appointment of a court of inquiry for further investigation. (See full letter, Rec., pp. 5–7.)

9. On the same day, to wit, April 22, 1884, without other or further communication with appellant, the Secretary of War, by direction of the President, appointed a court of inquiry, to meet in the city of Washington, D. C., Monday, May 5, 1884, to investigate the charges contained in said Bateman's letter of the 16th of April above mentioned.

10. The court of inquiry met on the 5th of May, 1884, and on May 21, 1884, reported the following facts:

"About October 15, 1881, Mr. J. Stanley Brown entered as a partner into the firm of Bateman & Co., bankers and stock brokers doing business in the cities of New York and Washington. In May, 1882, Mr. Brown, to increase his interest in the firm, borrowed $5,000 from Brigadier General David G. Swaim, for which General Swaim was to receive 6 per cent. interest and 10 per cent. of the profits accruing to Mr. Brown while holding that money.

In July, 1882, Mr. Brown determined to withdraw from the firm, and on the 15th of that month, in notifying General Swaim of that fact, Mr. Brown announced his wish to

repay the money borrowed and expressed regret that his action would put General Swaim to the inconvenience of a reinvestment. General Swaim, Mr. A. E. Bateman, and Mr. Brown thereupon had some discussion upon the transfer and reinvestment of that loan. This discussion was, however, inconclusive, and Mr. Bateman, for the firm of Bateman & Co., gave to General Swaim, at his request, what is known in this case as the "due bill," a copy of which is appended to this record (see par. 5, above). This due bill appears to have been an acknowledgment of the indebtedness of Bateman & Co. to General Swaim on account of the deposit with them of the $5,000 repaid by Mr. Brown.

During and after Mr. Brown's connection with the firm of Bateman & Co. General Swaim bought and sold stocks on margins through its agency, the usual accounts being kept by the firm. During all his dealings with Bateman & Co. General Swaim kept but one account with them, which included all those stock transactions and such other monetary dealings as he had with them.

Disagreements about accounts, or a failure on the part of General Swaim to understand them, occurred, and on several occasions the bank statements were furnished him and offers made to explain such items as he did not understand. In November, 1883, a consolidated statement of his accounts was furnished to General Swaim by the bank, showing a balance in his favor of $33.89. General Swaim caused statements of his accounts with the bank to be prepared, but as these omitted some transactions they were incomplete. A Mr. Terry, professing to be an expert accountant, was sent with one of these statements (prepared by himself) to the bank, by General Swaim, to get some explanations and to complete the statement by reference to the books. The books were shown to him and all the information asked for at the bank was given.

In the consolidated statement furnished by Bateman & Co. to General Swaim he is credited under date of July 20, 1882, with the $5,000 deposited by Mr. Brown upon leaving the firm. As against this and other credits General Swaim is charged with checks drawn upon the bank, all debits arising from his stock operations, etc.

About February 15, 1884, General Swaim assigned the due bill, by indorsement, to Bright, Humphrey & Co. (builders) to collect and credit to him on his account with them.

Mr. Humphrey testified that General Swaim told him to collect whatever was due on the due bill and credit him with whatever the amount might be. Mr. Bell, the cashier of Bateman & Co., testified that Mr. Humphrey presented the due bill to him as representative of the firm, and demanded payment of the nominal face value, principal and interest. Bateman & Co. refused payment, and thereupon General Swaim directed Bright, Humphrey & Co. to bring suit, he promising to defray the expenses of litigation. Suit was brought for $5,000, with interest and costs.

General Swaim maintains that he only brought that suit to determine the difference of a few hundred dollars between him and Bateman & Co., but that statement does not appear to have been known to Mr. Bateman until after he had preferred charges against General Swaim.

On the 16th of April, the day after the suit had been instituted, Mr. Bateman preferred his charges against General Swaim and furnished copies of them to the public press. On the next day, these charges having appeared in the newspapers, Mr. M. M. Parker, who appears as the friend of both parties to the controversy, brought them together at his office for the purpose of reconciling or arranging their difficulties. That meeting resulted in an understanding, the record evidence of which appears in the guarantee of General Swaim for surrender of the due bill to Mr. Parker and the agreement of General Swaim and Mr. Bateman to submit their business differences to the arbitration of Hon. Benj. Butterworth.

In the conversation leading to these arrangements reference was made only to so much of Mr. Bateman's charges as related to the due-bill suit. Mr. Bateman denies that the due bill was to be submitted to arbitration, but both General Swaim and Mr. Parker testify that such was their understanding of the agreement. The agreement having been made, Mr. Bateman addressed his second letter to the Secretary of War, withdrawing his charges and conceding that they had been made under a misapprehension of facts. The Secretary of War, however, on the 18th of April, transmitted both Mr. Bateman's letters to General Swaim by an indorsement, calling for a report or explanation upon the subject. General Swaim's reply was returned the same day.

After the publication of General Swaim's reply to the

Secretary of War Mr. Bateman, in a personal interview with General Swaim, charged that that reply was untrue and declared that it had put an end to the agreement between them. Meanwhile the Secretary of War, not being satisfied with General Swaim's explanations, reported the matter to the President recommending a court of inquiry."

Rec. p. 6-7

11. On the 30th day of June, 1884, the proceedings of the court of inquiry were referred by direction of the Secretary of War to Major R. N. Scott, 3d U. S. Artillery, directing him to prepare charges and specifications against appellant based upon the information contained in the within record (Rec., p. 10), and on the same day, by direction of the President, the Secretary of War appointed a general court-martial "for the trial of such persons as may be brought before it." (Rec., p. 11.)

On the 22d day of July, 1884, appellant was by order of the President placed in arrest and ordered to report in person on the 10th day of September, 1884, to the president of the general court-martial (appointed as above set forth), for trial on charges and specifications, a copy of which accompanied said order and are fully set forth at pages 13 to 18, inclusive, of the Record. (Finding of fact 4, p. 10.) The third specification, first charge, was entirely new and was not considered by the court of inquiry. On November 15, 1884, appellant was placed upon trial before said court-martial upon said charges and specifications.

The findings of the court-martial upon those charges and specifications, set forth at pages 18 to 23, inclusive, of the Record, show that appellant was acquitted of both charges and all the specifications, except the first and third specifications, which the court found in such a modified form as to eliminate every allegation that arose to the dignity of an offence, either military or otherwise, the court-martial substituting for the original charges the one charge of conduct to the prejudice of good order and military discipline under the 62d article of war.

A majority of the court-martial as organized for the trial of appellant was composed of colonels, and therefore inferior in rank to appellant, which could have been avoided, no reason or suggestion being given therefore notwithstanding the provisions of the 79th article of war. (Finding 6, Rec., p. 13, bottom.)

On the trial appellant pleaded to the jurisdiction of the court-martial that he was not accused by the commanding general of the army, and therefore the President had no legal authority to appoint the court-martial, and the court so appointed was not a lawful court for the trial of appellant on the charges preferred by Major Scott by direction of the Secretary of War, acting for the President, and moved that said charges be dismissed for want of jurisdiction in the court to try them, which motion was overruled by the court-martial. (Finding 5, Rec., pp. 10, 11.)

Appellant challenged the competency of a member of the court to sit on the trial, for the stated reasons that appellant in the discharge of his official duties in official reports had severely criticised and animadverted upon the conduct of such challenged member, and thus officially injured him, and had thereby necessarily incurred his ill will and enmity. The challenge was overruled and he sat upon the trial as president of the court. (Finding 8, Rec., pp. 30, 31.)

In the hearing of said cause the judge advocate introduced and the court admitted, without the authority of the appointing officer of the court, a member of the bar, who was Bateman's attorney, to act as assistant to the judge advocate in the prosecution of the case without being sworn and contrary to the 74th article of war and without precedent in the history of courts-martial in this country. (Finding 9, Rec., p. 31.)

It will be observed that under the form of the charges the issue on trial was as to the correctness of Bateman & Co.'s accounts as set off to the note or due bill. On this issue oral and secondary evidence in the shape of statements of

account, rendered but not accepted by appellant, were admitted, although the books of original entry were at hand for the purpose, but which appellant was not permitted to examine. (Finding 10, Rec., p. 31.)

Appellant was not permitted to show the bad character of Bateman, the principal witness for the prosecution. (Finding 12, Rec., p. 31.)

The court refused to hear the testimony of a material witness for appellant on the ground that the witness neither believed nor disbelieved in the existence of a Supreme Being, he merely stating that he did not know anything about a Supreme Being, his testimony only being received on the point of his belief or disbelief in a Supreme Being. (Finding 13, Rec., p. 31.)

The court received evidence of matters tending to injure the character and standing of appellant, which matters were in no way connected with the charges before the court. (Finding 11, Rec., p. 31.)

Immediately upon the court-martial reaching a finding and affixing a sentence in this case and pending action by the reviewing authority thereon appellant was, by order of the President, hurriedly placed on trial before the same court-martial on charges (emanating from the same source) of having made false certificates relating to public property and for wrongfully selling and disposing of public property under the charges of fraud and conduct unbecoming an officer and gentleman under the 60th and 61st articles of war (of which appellant was subsequently *honorably* acquitted, as published in general court-martial orders No. 20, series of 1885).

Just at the point in the trial of this second case when the Government had, with an immaterial exception, closed its evidence and made a *prima facie* case against appellant, he not having yet made a statement of his defence or offered any evidence, the President returned this case to the court-martial, directing the court to reconsider its action and urg-

ing a more severe finding and sentence, and in support of his views gave to the court-martial, with his endorsement, a lengthy opinion of the Attorney General in the nature of an argument on the merits of the cause, giving far-fetched and discolored views of the evidence; all of which was considered by the court-martial in secret session, without notice to or knowledge of the appellant or his counsel or an opportunity to reply thereto either by himself or counsel, and said court-martial thereupon acting under the influences thereof, without being able to increase the severity of their findings and without making any change therein, made another sentence, the severity of which was only equaled by its stupidity, a feature of which was the reduction of appellant from the rank of brigadier general to that of major. Under the same circumstances it was again returned by the reviewing authority with commendatory words for the severity of the sentence, but directing attention to the illegality of that part which sought to reduce appellant to the rank of major. Thus again returned for further reconsideration to this facile court, they sent it back to the President with the third sentence, which is the foundation of this suit, and, what is a remarkable fact, the court-martial before affixing the third sentence revoked the second sentence, leaving the first of the former sentences adjudged against appellant unrevoked. This last sentence was carried into execution February 24, 1885, and is now being executed against appellant. The court-martial thus affixed three distinct and different sentences, each one more severe than the one preceding, under their one original finding. (Findings of fact 6 and 14, Rec., pp. 23–29, 31.)

Assignment of Errors.

Errors are assigned by appellant as follows:

1st.

That the Court of Claims erred in deciding that the court-martial that tried appellant was lawfully constituted.

2d.

That the Court of Claims erred in deciding that the President of the United States was empowered to appoint the court-martial for the trial of appellant in the absence of any statute or other express authority of Congress.

3d.

The Court of Claims erred in deciding that the constitutional provision making the President of the United States the commander-in-chief of the land and naval forces of the United States conferred upon him the authority to appoint or direct the appointment of the court-martial which tried appellant, notwithstanding the law of Congress, which expressly limits his authority to do so to but one condition of affairs, which condition the Court of Claims finds did not exist in this case.

4th.

The Court of Claims erred in deciding that the facts found by the court-martial establish an offence under the 62d article of war.

5th.

The charges and specifications having been directed to be made and preferred by the President of the United States through the Secretary of War, after the court of inquiry

had failed to find facts upon which to predicate any charges, constituted the President of the United States the appellants accuser, and the Court of Claims erred in deciding that the President of the United States was empowered in person or by and through his Secretary of War to select the members and appoint the court-martial who should try the appellant upon said charges.

6th.

The Court of Claims erred in deciding that that Court had no jurisdiction to examine into the legality of the sentence of the court-martial when said court-martial was constituted without the authority of any statute or common law.

7th.

The Court of Claims erred in deciding that the findings and sentence of the court-martial which tried appellant were lawful, which was organized and conducted in the following irregular and unlawful manner, viz:

1. Officers inferior in rank to appellant were selected and appointed as members of the court-martial to try him when it could have been avoided.

2. An officer was permitted to sit on the trial as president of the court-martial who appellant had, in the performance of his official duties, on several occasions necessarily severely criticised in official reports and had thereby incurred his enmity and dislike, objection having been duly made to his competency.

3. A person was permitted, against the objection of appellant, to act as judge advocate of the court-martial who was not appointed by the convening officer of the court-martial nor sworn to a faithful performance of his duties.

4. The court-martial received oral and secondary evidence of an account when the books of original entries were at hand and available for the purpose, the points in issue being the integrity of the accounts in question.

5. Evidence was received, falsely and corruptly made, to implicate appellant in signing false certificates relating to money and property which formed no part of the subject-matter of the charges on trial.

6. The bad character of the principal witness for the prosecution before the court-martial was not permitted to be shown.

7. Refusing to hear the testimony of a competent and material witness for the defense; to all of which objection was duly made.

8. While the court-martial was in the midst of another trial, in which the appellant was the accused, charged with fraud and conduct unbecoming an officer and a gentleman under the 60th and 61st articles of war, and at the point when only the evidence for the prosecution had been presented to the court, showing a *prima facie* case against appellant, the President required the court-martial to reconsider their finding and sentence in this case in connection with a highly discolored and misleading opinion or argument of the Attorney General on the law and facts, and therefore a more severe finding and sentence was urged by the President upon the court-martial on two successive references made under the circumstances stated, and the court-martial acting under all these baleful influences adjudged three several sentences against appellant, each succeeding sentence being more severe than the one preceding it.

9. The court-martial in adjudging the second sentence did not revoke or set aside the first sentence, which is thus standing on record.

a statement which contains nothing to which Bateman's allegations might not possibly be a truthful supplement." (II finding of fact, p. 7).

Waiving the question of the truth of this statement, had the Secretary of War been disposed to be fair and impartial in the matter he would have required Bateman to set forth fully and clearly all his charges verified under oath (which is the usual course when private citizens not responsible under the articles of war prefer charges against officers) before putting the Judge Advocate General on his defense.

The prejudice of the Secretary of War, however, is not confined to this. Examine the third specification Record pp 16-17, and note how the language of appellant's endorsement of explanation is misquoted, garbled, and misconstrued in the seven particulars therein.

The preferring of the charges as well as the ordering of the court of inquiry and the court-martial by the Secretary of War were the acts of the President as much so as if done by the President in person.

Wilcox *vs.* Jackson, 13 Peters, 512; 17 Court of Claims, 102.

The closing statements in Bateman's letter in regard to army pay vouchers, and that he desired to present other charges under the head of conduct unbecoming an officer and a gentleman (VI finding of fact, p. 15), should have been investigated when properly presented and verified under oath; but this the usual and regular course was not pursued in this case. When these charges were brought before the court-martial they were shown to have been utterly unfounded. They were evidently thrown in as a make-weight and, if possible, to give color of a military offense. The truth is that all there was in Bateman's letter was the vexation incident to the suit on the note, and thereby the very just discredit of his firm in its business methods.

The Secretary of War, acting for the President, having adopted such means to investigate Bateman's unverified charges, and the court of inquiry not finding them sustained by the facts, then to prefer, to all intents and purposes, a new set of charges, he had neither the legal or moral right to select the members and appoint the court-martial to try them; that part of the proceeding should have been referred to Lieutenant General Sheridan, commanding the army. Had this regular and legal course been pursued the court-martial, when convened, would have been appointed in conformity with law.

Bateman could in no sense be considered the accuser and prosecutor, as he had unqualifiedly withdrawn his charges, conceding they had been made under a misapprehension of the facts.

The third specification, above quoted, being entirely new and personal to the Secretary of War, he was thereby disqualified from being directly or indirectly interested in or connected with the appointment of the court-martial for the trial of that matter; but a careful reading of appellant's said endorsement shows that there was no foundation whatever or even color for the allegations contained in this specification; but by misquoting and distorting the language of said endorsement a colorable military offense was formulated as a means of conferring jurisdiction on the court-martial to try appellant upon a purely personal business matter, which had no connection whatever with the military service or with his official position.

The Court of Claims maintains that the Secretary of War was justified in bringing the matter to the attention of the President and ordering it investigated by the court of inquiry. Appellant does not deny the propriety of this, but he does deny the power of the Secretary of War and the President, after ordering the investigation of the Bateman transactions by the court of inquiry and when that court reported the charges not sustained by the facts, to add

thereto new charges personal to themselves and then proceed to appoint and select the membership of the court-martial to try them, and then to finally review and decide upon the proceedings of such court-martial. This is the precise question for decision which the Court of Claims did not and would not decide. They ignore the facts and proceed on the erroneous theory that appellant did not desire an investigation of the facts before a military tribunal at the time. There is nothing to support or give color to this view of the case by anything done or omitted to be done by appellant.

The agreement to dismiss the suit on the note and submit all business differences to the judgment of an arbitrator cannot be construed as an effort on the part of appellant to suppress the facts.

The Court of Claims say that the withdrawal of the suit was apparently in consideration of Bateman's withdrawal of the charges. How could appellant's mere act of agreeing to a change of tribunals to hear and determine the business differences involved in the suit have this effect? Bateman's reasons for withdrawing his charges are given in his letter—*i. e.*, that they were not true. The Court of Claims go further. They say, Record, page 42:

"When the letters charging the fraud and withdrawing the charges were referred to 'him' for explanation he neglected to clear up the matter, and, on the contrary, gave an explanation, which was uncandid and evasive, compelling the Secretary of War to take further steps toward removing the shadow which had fallen on the reputation of the army."

Bateman had unqualifiedly withdrawn his charges, and no one entertained a suspicion that appellant's statement of facts to the Secretary was uncandid and evasive. It had not entered the minds of the court of inquiry and is not found in their report. Is it not plain that the use of these words embodying this fiction was an afterthought at the

time the charges were prepared for the purpose of strengthening the theory that a military offense had been committed? If anything further is necessary to make it clear that the President was the accuser and prosecutor in this case, the extraordinary and, it is submitted, grossly illegal methods resorted to by the President to induce the court-martial to find appellant guilty of conduct unbecoming an officer and a gentleman and consequent dismissal certainly demonstrate that fact.

2d. *There was No Law Authorizing the President to Appoint this Court-martial for Appellant's Trial.*

Lieutenant General Sheridan, commanding the army, was the immediate commanding general of appellant, and said General Sheridan did not prefer said charges nor cause nor direct the preferring thereof and was not the accuser or prosecutor of appellant in the trial had thereunder. (III finding of fact, p. 10.)

The only article of war or other statutory provision providing for the trial of officers by court-martial in time of peace is the seventy-second article of war, which is in these words:

"Any general officer commanding the Army of the United States, a separate army, or a separate department shall be competent to appoint a general court-martial either in time of peace or in time of war; but when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case." (Rev. Stat., §1342, art. 72.)

On the facts found and the plain terms of this article of war the court-martial had no jurisdiction to try appellant upon the above-quoted charges, and his plea to the jurisdiction should have been sustained.

The Court of Claims, however, does not place the power of the President to appoint courts-martial on the terms of the article of war quoted, but on his constitutional authority as commander-in-chief, and on this the Court say:

"It is evident, then, to the Court that, as courts-martial are expressly authorized by law and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer cannot be invested with greater authority by Congress than the commander-in-chief, and a power of command devolved by statute on an officer of the army or navy is necessarily shared by the President" (Rec., p. 35.)

On the contrary, the appointment of a court-martial for the trial of an officer is in the nature of the exercise of original jurisdiction, and the proceedings under the articles of war where sentence of dismissal or a higher degree of punishment is imposed are, by the terms of the articles of war, required to be brought before the President for his confirmation (article of war 105, 106), and no sentence respecting a general officer shall be carried into execution until it shall have been confirmed by the President (article of war 108). The policy of the articles of war is to make the President final arbiter in court-martial cases (Rev. Stat., § 1342, articles 72, 99, 104, 105, 106, 108, 109, 111, 112). It is no derogation of the constitutional power of the President as commander-in-chief to fix the original jurisdiction to appoint general courts-martial within the plain and unambiguous terms of the 72d article of war any more than it is to limit the judicial power of the highest court in the land to that of appellate jurisdiction over the numerous questions of which the circuit and district courts have original jurisdiction exclusive of the Supreme Court. The President, with his power of command over the commanding generals of armies, geographical divisions, and departments, and with the full and ample power of revision

and pardon confided to him in court-martial cases, can always see that justice is done; and it is not meet nor proper that he should exercise both original and final powers over court-martial cases, save only in the excepted cases mentioned in the 72d article of war, where he could not be imputed as acting where he was accuser or prosecutor. It is within the power of the President, under his constitutional power as commander-in-chief, to prevent the holding of any court-martial under the orders of a subordinate commander if he so desires. He may revoke or annul the orders of any commander no matter what the subject may be, and he may suspend any officer from his command at once. If the Court of Claims had said that the power of command is always present in the hands of the President, even in the exercise by subordinate commanders of original jurisdiction under the 72d article of war, they would have reached a proper conclusion. Again the Court of Claims say (p. 35):

"If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress, by the simple expedient of exclusively granting authority to appoint courts-martial and approve sentences to a few officers of the army and tacitly ignoring the President, could practically defeat the express declaration of the Constitution and strip the office of commander-in-chief of all real powers of command. The Court cannot ascribe any such purpose to the legislation of Congress. Indeed, it seems evident to the Court that if the seventy-second article was enacted with the intent that the President should exercise no authority except in the single instance where it is withheld from commanding officers and exclusively devolved on him, it would be necessary to ascribe an absurd purpose to this legislative enactment, viz., that the intent of the statute was that the general of the army and the lieutenant general should be exempt from punishment. If, for illustration, in 1884 the lieutenant general had stood in the place of the Judge Advocate General how could he have been court-martialed?"

In reply to the suggestion of the Court of Claims that if our position is tenable Congress might by law strip the

President of the attributes of command, etc., it is quite sufficient to say that the Court begs the question by assuming that the authority to appoint courts-martial is an incident or attribute of command, and thereupon proceeds to defend an assumed right that does not exist, and hence is not assailed.

No intelligent person will assert that Congress can abridge or strike down the constitutional authority of the President, nor that the President can usurp the constitutional authority of Congress to make "rules for the government and regulation of the land and naval forces."

It is submitted that never in the history of the army in this country or in England has the commander-in-chief or any other commander claimed or attempted to exercise the authority to convene courts-martial as a mere incident of command and without the authority of statute except in the case of James the II, whose fate should be a warning to all usurpers.

The logic of the reasoning of the Court of Claims is that since in an assumed case Congress has made no provision for punishing by court-martial an offender, therefore other offenders may be proceeded against without law. The argument at best proves that Congress should enact law for trying and punishing those who may be found guilty of offenses; but it does not prove that there is either wisdom or justice in proceeding in any case without law.

The necessity for law does not supply or take the place of law and thus render legislative enactments unnecessary.

Clearly the Court of Claims misconceives the powers and functions distributed by the policy of the articles of war between the constitutional commander-in-chief and the generals commanding armies and geographical departments, the 72d article of war fixing the jurisdiction in the generals, while the whole subject of revision is confided to the President by articles of war 99, 104, 105, 106, 108, 111, and 112, R. S., 1342, pp. 237–239 and 240. These functions of the constitutional commander-in-chief far transcend those of the

convening officer of the court, but the policy of these articles shows that in no sense should the accusing commander be the appointing officer of the court-martial.

This construction of the constitution of courts-martial by the Court of Claims is not sustained by reason or authority or the analogies drawn from the jurisdiction and powers of the courts of the United States organized under the Constitution and acts of Congress. This Court, in Sheldon *vs.* Sill, 8 Howard, page 441, said:

"Courts created by statute can have no jurisdiction but such as the statute confers."

And see United States *vs.* Hudson, 7 Cranch, page 32.
Ex parte Bollman, 4 Cranch, p. 93.
Harrison *vs.* Hadley, 2 Dillon, 229.
U. S. *vs.* Cultus Joe, 15 Int. Rev. Rec., 57.

If the jurisdiction and powers of the courts of the United States are thus circumscribed what can be said of the jurisdiction and powers of courts-martial which do not proceed according to the course of the common law, but are what are usually termed exceptional tribunals, convened under the authority of express statute for a special purpose. The court-martial in this case for the trial of appellant, as we have seen, had no authority for its existence by any statute or the Constitution.

There is no instance on record where the commanding general of the army has been brought before a court-martial for discipline. The disciplinary powers in the hands of the President, in time of peace, of suspension, or with the Senate, as decided by this Court in the Blake case (—), of complete removal, and in time of war to summary dismissal, are ample powers to insure and enforce good discipline on the part of the officers named. Probably the late War of the Rebellion furnished as many subjects among high military commanders in our army for disciplinary punishment (by court-martial) as the country will ever

again witness; but, except the case of General Fitz John Porter, whose court-martial was not appointed by the President, not one superior military commander was tried by court-martial during that entire period. The Court of Claims say (Rec., p. 37):

"Not until 1830 did the President come into a statute relating to courts-martial, and the enactment is plainly restrictive of the preceding legislation. It is to limit the authority of commanding officers, not to confer power on the President: 'An act to alter and amend the 65th article, etc.' '*Be it enacted*, That whenever a general officer commanding an army or a colonel commanding a separate department shall be the accuser or prosecutor of any officer in the Army of the United States under his command the general court-martial for the trial of such officer shall be appointed by the President of the United States.'"

Act of May 29, 1830, 4 S. L., p. 417.

This act is undoubtedly restrictive in preventing certain commanding officers from acting when they are accusers or prosecutors, and it was also to provide an impartial tribunal whenever that condition should arise, that the wheels of justice might not be clogged.

This subject was called to the attention of Congress in 1830 by the case of Colonel Rodger Jones, adjutant general of the army at that time, who was ordered to be tried by a court-martial appointed by General Macomb, commanding the army, on charges preferred at the instigation of said General Macomb. If the President possessed the authority, under his constitutional power of command, why did he not appoint the court to try Colonel Jones? Was the act passed to compel the President to perform a specific duty under the Constitution? Would this not "ascribe an absurd purpose to this legislative enactment," to which the Court of Claims object?

Appellant has examined the records of trials of general officers and others where courts were said to have been ap-

pointed by the President, from the ratification of the Constitution to 1830, and not one general court-martial was appointed by the President or by his direction or authority, so far as the records in the War Department show, and appellant asserted the same fact before the Court of Claims, but that Court seems to have ignored or lost sight of many facts in their determination of this case.

The Court of Claims in a previous case (that of Major Runkle, 19 Court of Claims Repts., 396; reversed in this Court, 122 U. S., 555), placed the power of the President on somewhat different grounds (or it may be on the same grounds, but differently expressed). In that case they say:

"Courts-martial are the creatures of orders, the power to convene them being an attribute of command. As commander-in-chief, the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court and when so assembled to exercise certain powers conferred upon them by the articles of war. This general power has been exercised in repeated instances by the President since the formation of the Government. Indeed, if the same could not be exercised, it would be impracticable in the absence of an assignment of a general to command the army to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander, as, for example, a large proportion of the officers of the general staff and the whole body of retired officers. The authority of the President to appoint general courts-martial has in fact been exercised from time to time from an early period in a series of cases commencing with the case of Brigadier General Hull, Major General Wilkenson and Gaines, tried in 1813–'16, and including Brevet Major General Twiggs in 1858."

An examination of the records shows that the courts for the trial of these cases prior to 1830 were not appointed by the President, but by the sole authority of the Secretary of War, no objection being made by any one as to the legality of the court. The light and airy manner in which the

Court of Claims treat the appointment of courts-martial is, to say the least, very remarkable in view of the fact that so large a number of citizens of the United States are subject to their jurisdiction in questions of life, honor, and property. Juries in the ordinary courts are drawn by lot, but the members of courts-martial are selected personally by the appointing officer; the rank and number of members, from five to thirteen, rests in a sound legal discretion to be impartially exercised according to the limitations and restrictions of the express articles of war regulating the same. (Art. of War 75–79, sec. 1342 R. S. U. S., pp. 237, 238.)

This action, although embodied in the form of a military order and addressed to the officers designated to assemble as a court, nevertheless requires the exercise of judicial discretion and is quite a serious matter to the person to be tried, hence the statutes regulating the subject ought to be carefully and strictly observed.

Also, the statement that the retired officers and officers of the general staff could not be tried by court-martial unless the court was convened by the President is erroneous.

Every foot of territory under the flag is covered by military command. The retired officers and officers of the general staff are located over the country within the geographical limits of departments in which they can be tried, and are tried by courts convened by generals commanding departments, when said generals are not accusers or prosecutors or *quasi* such, and in cases of those officers not under a department commander it is now and always has been the practice for the commanding general of the army (if he does not desire to act in person), the Secretary of War, or a superior commander to instruct subordinate commanders, competent to appoint courts-martial, to proceed against such military offenders as the articles of war provide and to appoint courts-martial for their trial, if necessary, and thus the rule of necessity relied upon by the Court of Claims does not and never did exist in our army.

In a fugitive note to an opinion of the Attorney General (15th Opinions, 297) the author maintains the power of the President to appoint courts-martial in the army independent of the seventy-second article of war or other legislative grant on the following reasoning: At the ratification of the Constitution that power existed in the commander-in-chief of the United States army and had been exercised by him by virtue of the statutes then in force and until the revision of the articles of war, in 1806, and after stating the early statutes on the subject and the terms of General Washington's commission (which was itself an act of Congress) to cause strict discipline and order to be observed in the army, etc., the author of the note jumps to the wholly unwarranted conclusion "that the commander-in-chief of the army, the President, is by the Constitution invested with authority to constitute courts-martial and consequently can legally exercise such authority without legislative grant," and the Court of Claims endeavors to fortify their action in this case by the same line of reasoning. (Rec., p. 37.)

A complete answer to this is:

The only statutory provision in force at the ratification of the Constitution providing for the appointment of general courts-martial in the army was the resolve of May 31, 1786, which is in these words:

"General courts-martial shall be ordered as often as the case may require by the general or officer commanding the troops."

All former statutes on the subject were expressly repealed.

It certainly cannot be claimed that the President, under the Constitution, would come within the designation of this statute or of the terms of Washington's commission as "the general commanding the revolutionary armies."

From 1874 to 1884 it was held by the War Department that a colonel commanding a department was not authorized to convene a general court-martial. Here the attribute

of command existed, but the power to appoint the court-martial was wanting. This decision was made under the folfowing facts: By the 69th article of war (code of 1806) colonels commanding separate departments were empowered to appoint general courts-martial. Upon the publication of the revision of the statutes, in 1874, the grant of authority to colonels to appoint general courts-martial was omitted therein and was not restored for ten years, until the passage of the act of 1884; and during this period of time colonels, although regularly assigned to the command of separate departments, were forbidden to appoint general courts-martial, because by the terms of the 72d article of war they were not enumerated among those competent to appoint.

If the transition exists, as the Court of Claims say, so that the President may personally act, when, by the terms of the statute, only general officers are empowered to act, why did not the power to convene general courts-martial descend to colonels who were legally exercising the full powers of command of a general officer commanding department in this instance? But the 72d article of war was otherwise properly construed in conformity to the legal maxim *expressio unius est exclusio alterius*, and it required the force of legislation to confer this power upon colonels. (23 S. L., 121, 1 supp.; R. S., 463.)

Article 38 of the rules and articles for the navy provides:

"General courts-martial may be convened by the President, the Secretary of the Navy, or the commander-in-chief of a fleet or squadron, but no commander of a fleet or squadron in the waters of the United States shall convene such court without express authority from the President." (R. S. U. S., p. 282.)

Thus Congress confers in terms upon the President full and unrestricted power over the appointment of general courts-martial in the navy. Why was it necessary to do this if the President by virtue of his office as commander-

in-chief already possessed plenary and unrestricted power over the subject? His office and power over the army and navy by the terms of the Constitution are precisely the same. Courts-martial being courts not proceeding according to the course of the common law and having jurisdiction by the articles of war to adjudge the severest penalty known to law, the power to appoint and to bring them into existence should be exercised in strict conformity with the statute.

Runkle's case, 122 U.S. Rep., 555, 556, and cases cited.

The question historically considered leads to the same conclusion.

At the time of the Declaration of our Independence, 1776, neither the British sovereign nor the commander of an army under him was empowered by the laws of England to appoint courts-martial, except as conferred under the provisions of the annual mutiny act.

It may be accepted as historically and legally true that up to the time of the accession of William and Mary, in 1689, a standing army in time of peace and its incident, courts-martial, had no existence in England, and the maintenance of such an army and the attempt to govern it by courts-martial by James II was one of the grievances of the English people against him which led to his dethronement and exile. In the articles of war made by James II in 1686 and 1688 councils of war or courts-martial were provided for. In the oath of fidelity required to be taken by these articles by every officer and soldier "obedience and submission" were enjoined "to all such rules and articles of war as are or shall be established by his majesty."

The first mutiny act of 1689, entitled "An act to punish officers or soldiers who shall mutiny or desert," declares—

"Whereas the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is against law;" * * *

failing to provide for the organization of general courts-martial, and they were amended in this respect by resolution of April 14, 1777, in the following terms:

"The Continental general commanding in either of the American States for the time being shall have full power of appointing general courts-martial."

The code of articles of war enacted May 31, 1786, repealed all other articles of war relating "to the holding of courts-martial," and provided:

"General courts-martial shall be ordered, as often as the cases may require, by the general or officer commanding the troops."

This code continued in force until repealed and supplied by the code of April 10, 1806, which latter code, as amended in this particular on May 29, 1830, continued in force until repealed and supplied by the code enacted June 24, 1874, in the Revised Statutes of the United States. The 72d of these articles is the only statute authorizing the appointment of general courts-martial in time of peace, and reads as follows:

"Any general officer commanding the Army of the United States, a separate army, or a separate department [or colonel commanding a separate department, as amended in 1884] shall be competent to appoint a general court-martial, either in time of peace or time of war. But when such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or orders in the case."

In the 69th number of the Federalist it is said:

2d. "The President is to be commander-in-chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme com-

mand and direction of the military and naval forces as first general and admiral of the confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all of which by the Constitution under consideration would appertain to the legislature."

Federalist No. 69, pp. 515, 516.

That the authority to appoint courts-martial pertains strictly to the legislative power of regulating will be seen by reference to the terms of the articles of war from the earliest to the latest code enacted.

An American court-martial is the creature of statute law. If it has not statute law for its foundation it has no legal existence. When Congress enacted the seventy-second article of war it excluded all other methods of appointing a general court-martial in time of peace, and from the exclusive powers of Congress over the subject no one can have any authority either to convene a court-martial or to affirm or disaffirm its decision unless it can be shown that such authority has been delegated by Congress.

U. S. *vs.* Fletcher, 148 U. S., p. 84.
Dynes *vs.* Hoover, 20 Howard, 65.
Greenleaf, Ev., vol. 3, sec. 470.
Attorney General Crittenden, 5 Opinions, 508.

In *Ex parte* Milligan, 4 Wallace, at page 121, this Court say:

"They cannot justify on the mandate of the President, because he is controlled by law and has his appropriate sphere of duty, which is to execute and not to make the laws, and there is no unwritten criminal code to which resort can be had as a source of jurisdiction."

And at page 139 same case the Court say:

"The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply

many and subordinate and auxiliary powers. Each includes all authorities essential to its due exercise, but neither can the President in war more than in peace intrude upon the proper authority of Congress nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President nor any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians."

This case arose on the power to appoint military commissions in time of war, it is true, but the language is apt and meets the language of the Court of Claims in this case.

In Dynes *vs.* Hoover (20 Howard, 65–81) this Court say:

"Persons, then, belonging to the army or navy are not subject to illegal or irresponsible courts-martial when the laws for convening them and directing their proceedings for organization and *for trial* have been disregarded. In such case everything which may be done is void; not voidable, but *void.*"

In these cases the principle is fixed and settled that under the Constitution of the United States there is no common-law jurisdiction conferred upon the President to order general courts-martial and to review and pass upon the proceedings, findings, and sentence as in this case. From the ratification of the Constitution of the United States to the passage of the act of May 29, 1830 (4 Stat. L., 417, ch. 179), there was no statutory authority empowering the President to appoint a court-martial in any case, and the very existence of this statute and the necessity therefor at the time shows it was not the understanding of Congress nor the President that a court-martial could be appointed in the army without the authority of statute. It was always in the power of the President to revoke the orders of a commander of an army or department, and thus stop *in limine* the trial of an officer where such commander was the

accuser or prosecutor, and to enable free and untainted justice to have its sway in such cases the President was empowered by that statute to appoint the court-martial.

3d. *The Formation of the Court and its Proceedings were not in Conformity to Law.*

A majority of the court-martial as organized for the trial of appellant was composed of colonels. A condition of peace existed at the time. There were sixteen general officers present for duty, nine of whom were stationed in this city, where the court was convened. (VII finding of fact, Rec., p. 30.)

The 79th article of war provides (sec. 1342, R. S. U. S., p. 238):

"Officers shall be tried only by general courts-martial, and no officer shall, when it can be avoided, be tried by officers inferior in rank to him."

And notwithstanding the mandatory expression of this article of war, no reason or suggestion is given for so constituting the court. The findings of fact show that general officers of experience were here on the ground available for the duty. The record should affirmatively disclose that the appointment of officers inferior in rank to appellant in contravention of the article of war to try him grew out of the necessities of the service, which in the language of the law rendered such selection unavoidable, the rule being that where the existence of a fact is necessary to confer jurisdiction that fact shall be affirmatively stated, and this is the practice in the administration of justice in military as in civil courts.

A court-martial being a special tribunal created by statute, its jurisdiction and authority are defined and limited by statute. This Court has uniformly decided that every

requirement of the statute shall be observed and complied with, and nothing is left for intendment.

See authorities above cited.

In conformity with this rule the Regulations for the Navy, article 1783, provide as follows:

"A statement that no other officers than those named can be assembled without injury to the service shall be an essential part of the order convening the court as showing that the requirements of the statutes relating both to the number and rank of members have been complied with, as far as the interests of the service allow."

This case is distinguished from Mullen *vs.* U. S., 140 U. S. R., 240. In that case the court-martial was convened at Hong Kong, China, more than ten thousand miles from the national capital, where it was impossible to obtain officers of superior or equal rank; but in the case at bar the court-martial was convened at the national capital, where sufficient officers of equal and superior rank to appellant were unquestionably available without inconvenience to the service, as shown by the facts found by the Court of Claims. If the facts had been otherwise, it would have been so stated in the order convening the court-martial.

The selection of the members and the appointing of the court, as well as the proceedings of the court, are essentially judicial powers.

"Judicial power as contradistinguished from the power of the laws has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion—a discretion to be exercised in discerning the course prescribed by law, and when that is discovered it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

Osborn *vs.* The U. S. Bank, 9 Wheaton, p. 866.

Appellant challenged the competency of a member of the court to sit on the trial for the cause stated that appellant had in the discharge of his duty severely criticised, officially reproved, and animadverted upon the conduct of such challenged member in official reports and otherwise, which naturally and inevitably prejudiced said member against appellant. The challenge to said member was overruled and he sat upon the trial as president of the court. (VIII finding of fact, Rec., pp. 30, 31.)

The eighty-eighth article of war provides (sect. 1342, R. S. U. S., pp. 88, 89):

"Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof and shall not receive a challenge to more than one member at a time."

There being no peremptory challenges allowed before courts-martial, even when life, honor, and liberty are involved, simple justice would demand that courts-martial should be just, not to say liberal, towards an accused in passing upon the sufficiency of challenges.

The grounds or causes of challenge stated would be good cause to excuse a juror in the ordinary courts of civil and criminal jurisdiction.

We have adopted the practice of courts-martial in England so far as applicable in our court-martial jurisprudence. Kennedy, an English author, in his work on Courts-martial, page 21, edition of 1825, says:

"But there are two other causes of challenge of a much more delicate nature and the various degrees of which scarcely admit of definition. I mean suspicion of prejudice and malice. Courts-martial, therefore, when such a cause is hinted, prefer rather to deviate from strict lines. They accordingly refrain from all inquiry into the particular cir-

cumstances whence this suspicion may have arisen and permit the member challenged to withdraw."

And see—

Hough's Precedents on Mil. Law, p. 664.
Simmon's Courts-martial, § 500.

The same rule has uniformly obtained before American courts-martial.

See O'Brien's American Mil. Law, p. 239.
De Hart, p. 118.

If it be said it was in the discretion of the court to excuse or retain the challenged member, the answer is that it is a legal not an arbitrary discretion, and in the case at bar there was an abuse of that discretion to the obvious prejudice of appellant and presents a case in which he is remediless unless this Court shall judicially determine and adjudge that the law and not the caprice or arbitrary will of a majority of the court-martial shall govern proceedings affecting the character, liberty, and property of the appellant.

The judge advocate introduced and the court admitted a citizen lawyer, Bateman's attorney, to act as associate to the judge advocate to assist in the prosecution of appellant before the court-martial without the sanction or authority of the convening officer of the court, and such person acted in all respects as the official judge advocate in the prosecution (IX finding of fact, Rec., p. 31) and took the leading part in presenting the case on the part of the Government, having full access to all papers and records of the court without being sworn, and, not being an officer of the court or of the army, was irresponsible under the articles of war.

The seventy-fourth article of war (Revised S. U. S., sec. 1343, p. 237) provides:

"Officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same."

No person other than the judge advocate duly appointed by the authority constituting the court-martial can appear before the court as judge advocate. Such is the standing rule and orders of the War Department.

Digest of Opinions of the Judge Advocate General, p. 297.

And see—

Brooks *vs.* Adams, 11 Peck (Mass.), pp. 442–'4.

The first and only case of which we have a record on this subject is in the case of General Wilkinson, tried in New York by court-martial (record on file in War Department), where it appears that the Hon. Martin Van Buren presented himself with a letter of authority from the Secretary of War to appear and assist the judge advocate of the court in the trial of the case against General Wilkinson. The court, after full deliberation, decided that he could not so appear, "as it would be against law and military usage."

Can there be any question that if the court-martial had been composed of fourteen members, thirteen being the maximum authorized by law, that it would have been an illegal court, and that its proceedings would be void? It has, without an exception, been held that where a member duly sworn of a duly constituted court-martial acts, under direction of the court-martial, as judge advocate of the court such action renders the proceedings void for the reason that the law gives the exclusive authority to the convening power to appoint the judge advocate. Therefore it follows as matter of law that the person so acting in the case at bar without the authority of the convening officer of the court must render the proceedings void. That the Court may understand the supposed reasons for this irregular and illegal proceeding it may not be improper to state that the actions of the regularly designated judge advocate of the court were so conspicuously irregular and unjust in this case as to attract the attention of Congress, and a law was

enacted prohibiting the judge advocate of a court-martial being present in the court during its private deliberations (Act July 27, 1892; 27 Stat. at L., p. 278). It was a notorious fact that during the trial of this case before the court-martial, the judge advocate having his duties in the open sessions of the court performed by his substitute, Bateman's attorney, leaving him free to vibrate between the reviewing authority and the court at will, what messages were conveyed in this way cannot be known, but can be imagined from the recorded proceeding and final results. That such intercourse was of daily and often of more frequent occurrence was a notorious fact. What legitimate purpose such a proceeding could serve it is difficult to imagine.

The prosecution introduced evidence tending to charge and convict appellant of the offense of having received commutation of quarters to which he was not entitled, and that he had signed false certificates in drawing said commutation money. No such issue being on trial and no such accusation ever having been made or insinuated against him (Rec., p. 31), such testimony could serve no legitimate purpose, and the only apparent object and desire of the prosecution in introducing it or in a majority of the court in permitting its introduction was to make a voluminous record, regardless of the relevancy or legality of its contents, to confuse and cover up the established facts demonstrating appellant's entire innocence and to lend what aid it might to scandalize him.

It will be observed, as above stated, that under the form of the charges the issue on trial was as to the correctness of Bateman & Co.'s accounts as set-offs to the amount of money specified in the note. On the trial of that issue oral and secondary evidence was received notwithstanding the books of original entry were by process brought to the court; but the court refused to permit appellant to examine his said accounts in said books and compare them with the alleged transcripts from said books made and presented to

the court by Bateman through the judge advocate and which were received by the court as the evidence of what the books contained.

Appellant was not permitted to show the bad character of Bateman, the principal witness for the prosecution. (XII finding of fact, Rec., p. 31.)

A witness offered by appellant would testify that while he was in the employ of Bateman & Co. Bateman required him to make false entries and reports of sales and purchases of stock about the time of the alleged purchases of stocks for appellant, which testimony would throw strong light upon the credibility of Bateman & Co.'s accounts and the justness of appellant's exceptions to the statements of accounts rendered but not accepted by him. The court would not permit the witness to testify on the ground that the witness, on being examined touching his competency as a witness through want of religious belief when asked if he believed in a Supreme Being, replied that he knew nothing about the subject, and therefore he neither believed nor disbelieved; he had no belief on the subject; no question as to his intelligence and integrity was raised. He had been sworn without objection and was proceeding with his testimony on the second day of his examination when the question was raised by the prosecution. No other testimony was received or offered on the question of his religious belief but the testimony of the witness himself. The law presumes all witnesses tendered both competent and credible, and the objection that the witness is insensible to the obligations of an oath through want of religious belief must be sustained by the evidence of persons other than the witness, who cannot be examined as to his religious belief.

1 Greenleaf, Ev., § 370, note.

Wharton, Crim. Ev., § 394.

Courts-martial are bound by the common law of the land in regard to the rules of evidence as well as other rules of law so far as applicable to the manner of proceeding.

3 Greenleaf, Ev., § 469.

11 Opinions Att'y Gen'l, p. 344.

On this the Court of Claims say (Rec., p. 32):

"Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient grounds for reversal of their judgment if it was sitting as an appellate court, but there is always this radical difference between an appellate court sitting for the correction of errors and a civil court, into which the record of a court-martial is collateral: In the former there is not a failure of justice. The appellate court may reverse a judgment or prescribe another or award a new trial. In the latter the court must either give full effect to the sentence or pronounce it wholly void."

And from this reasoning the Court of Claims did not consider as error affecting the proceedings of the court-martial the appointment of officers of inferior rank to appellant on the court-martial when this could have been avoided, and by so doing the terms of the seventy-ninth article of war were plainly ignored and violated; nor that officers of known hostility to appellant were selected and appointed on the court and remained on the court, notwithstanding appellant's objections to them. This action also violated the letter and spirit of the eighty-eighth article of war, as well as the usage of courts-martial and common justice. Nor that a person was permitted to act as judge advocate who was not appointed or sworn as such. This also was in violation of the seventy-fourth article of war. Nor that the court-martial flagrantly violated the laws of evidence on the trial detrimental to appellant; and the repeated efforts to induce the court-martial to increase the severity of its sentence. This was the crowning iniquity of the court-martial. What are denominated mere errors of the court-

martial by the Court of Claims, it will be seen, involve specific disregard or violation of the statute under which the court-martial was bound to proceed. It is submitted that within the rule laid down by this Court as governing the proceedings of courts-martial in Runkle *vs.* U. S., 122 U. S., and in Dynes *vs.* Hoover, 18 Howard, every one of these matters complained of are not mere errors, but are palpable and determined violations of the law, and therefore are jurisdictional and sensibly affect the legality of the proceedings and sentence of the court-martial.

4th. The Findings of the Court-martial do not Show an Offense Under the Sixty-second Article of War.

There was no military offense found by the court-martial, which is essential to its jurisdiction.

The issue under the first specification was whether or not appellant received, acquiesced in, assented, and agreed to alleged statements as to accounts rendered to him by Bateman & Co., showing that the sum of money mentioned in the due bill had been reduced to $33.89 when said due bill was transferred, and that the due bill, by its terms under the law, was such an instrument that a "wrong" could be committed on Bateman & Co. by its transfer as alleged. No such issue was found or could have been found by the court-martial.

1. There is no finding by the court-martial that appellant assented to the methods of disposing of the due bill claimed by Bateman & Co.; that it should be carried into a general account.

2. There is no finding by the court-martial of acceptance or acquiescence of claimant to the statements of account alleged to have been made by Bateman & Co. reducing the $5,000 to the sum of $33.89.

3. An amount not less than $33.89 is shown by the findings to have been due claimant on the due bill; therefore he had a right to assign and transfer the same without committing any "wrong" upon Bateman & Co. by such assignment and transfer. The due bill was made July 15, 1882, and the assignment and transfer thereof was made, as alleged in the specification, February 24, 1884, and was thus nineteen months overdue, and therefore open to all defenses of payment or set-off that Bateman & Co. might interpose against it regardless who the owner or holder might be.

Under section 810 of the Revised Statutes of the District of Columbia, allowing mutual debts of dissimilar kinds to be set off, Bateman & Co. were by the assignment and transfer of the due bill deprived of no right of set-off or other defense.

The third specification, as found by the court-martial, sets forth the correspondence heretofore referred to, upon which the prosecution founds the charges. The *gravamen* of this specification is all personal to the Secretary of War. It is found by the court-martial that in claimant's said endorsement of April 18, 1884, explaining the Bateman transactions, he was evasive, uncandid, and calculated and intended to deceive the Secretary of War in four particulars:

1st. In stating that he had a bank account with Bateman & Co. and, besides, loaned them $5,000 at 6 per cent., whereas he had *at the time* but one account, had not loaned them $5,000, but had deposited what purported to be that amount, but which was actually but $4,000. What time is here alluded to is impossible of comprehension, as appellant in his said endorsement fixes no point of time when he had the bank account with that firm. Without inquiring here what business it was of the Secretary of War whether the money appellant had with Bateman & Co. was a *loan* or a *deposit* or whether the exact sum was $5,000 or $4,000 or was $100,000 or one cent, but assum-

ing the Secretary to have been exercising some species of guardianship over the parties best known to himself, it may be remarked that Bateman in his letter, set out in the specification, admits that appellant deposited the full sum of $5,000, for which he gave the negotiable due bill or note, and the due bill shows on its face the existence of a loan or deposit; it is immaterial which. This particular is not proved, nor is it found by the court-martial that appellant acquiesced in or assented to the statement of account alleged to have been rendered by Bateman & Co. to him, but, on the contrary, the court, in finding under the first specification, where that issue was directly presented, wholly ignored it and left it undetermined, and thus on the face of the proceedings the state of the accounts between appellant and Bateman & Co. remains an open question; but it is certain that this court-martial was totally incompetent, and it was entirely beyond its jurisdiction to settle or pass upon the accounts for any purpose, and it did not do so; but if Bateman & Co. thought proper to merge the money represented by the due bill in their general account with appellant that was exclusively their concern, and appellant should not thus be held bound thereby, and he is not so held in the findings of the court-martial.

2d. Insufficiently and incorrectly describing the said due bill in said endorsement by the omission of the words "10 per cent. and interest 6 per cent."

The $5,000 represented by the due bill was first loaned to a member of the Bateman firm as a personal loan. Upon the retirement of this partner the debt was assumed by the firm giving the due bill therefor (II finding of fact, Rec., pp. 8, 9). The omitted words referred only to dealings which had been closed and settled with the retiring partner and the omitted words were written on the due bill, under the signature of the firm, by Bateman and formed no part of the due bill. That no intention existed to deceive the Sec-

retary of War or to conceal anything from him by the omission of these words is apparent from the fact that the original due bill was at the time of making the endorsement in the hands of third parties, where it has remained ever since. See sixth particular, third specification of the charges as brought before the court (VI finding of fact, Rec., p. 17). That an intent or effort to conceal or deceive can be inferred from these facts is preposterous and absurd.

The fourth, fifth, and part of the first particulars are manifestly founded upon misquotation and misrepresentation of the language used in said endorsement, which shows appellant said the exact opposite. He did not say in said endorsement that he had personally presented the due bill for payment or that he had personally endeavored to have the due bill referred to arbitration or fix any point of time when he had the bank account with said firm.

The note or due bill is an absolute, unqualified promise to pay the sum of money therein mentioned. There is nothing in its terms importing doubt or calling for arbitration, and it is absolutely incredible that the President and Secretary of War should concern themselves in supporting such willful, wicked distortion of language in the private and personal transactions of appellant. No reason is found or discernible why appellant should be or was evasive and uncandid or intended to deceive the Secretary of War in anything that transpired with Bateman & Co., as set forth in said endorsement. What appellant said in said endorsement and what he intended to say therein is plain, namely, he differed with Bateman & Co. as to the correctness of a number of charges and items in the account rendered by that firm which were intended as set-offs or offsets against the sum represented by the due bill, and it was these matters he desired to arbitrate.

The subject of appellant's private and personal affairs, as shown by the findings, could not properly be the subject of such inquiry by the Secretary of War any more than in-

quiry into the food which supplies his table or the furniture and appointments of his dwelling-house. Bateman & Co. did a pretended business in buying and selling stocks in the city of Washington, D. C. They claimed to have purchased and sold such stocks on account of appellant, which he denied. They also, by false representations, misled and entrapped appellant into ruinous investments, for which he proposed to hold them responsible by the suit instituted, and dismissed to admit of arbitration proceedings; which arrangements the War Department broke into and converted into a wicked, malicious prosecution of appellant before the court-martial.

But in what possible manner could appellant's private business transactions under these circumstances affect the discipline of the military service? It has been ruled by the War Department that even manslaughter, larceny, or burglary committed against a citizen by a soldier without a military post, or where the party and property is not under military control, protection, or charge, does not constitute the offense of conduct to the prejudice of good order and military discipline. How, then, can such conduct as herein set forth be held to be within that charge?

Digest of Opinions J. A. General, p. 43.

Commenting on the nature of the findings, the Court of Claims say (p. 39):

"The specifications do indeed aver that his reply to the Secretary of War was 'evasive, uncandid, and false, and calculated and intended to deceive the Secretary of War;' but the falsity of the reply depended upon the fraud charged in the first specification. If there was a fraud practiced upon Bateman & Co., then the reply was false. If there was no fraud practiced there was little or nothing to be false about. It is manifest that the court-martial intended to find and found that no fraud had been practiced or attempted, and when that conclusion was reached the charge of conduct unbecoming an officer and a gentleman fell, and upon it the court properly found not guilty."

And at page 41:

"The findings further show that the claimant in course of business transactions with that firm reduced the balance to his credit until there 'was due him only a balance of $33.89 [the court-martial, however, did not find as a fact that this sum was the correct balance due, but struck it out of the specification as alleged. See and compare VI finding of fact, Rec., pp. 14, 18, and 20], when he transferred and assigned the instrument to the firm of Bright, Humphrey & Co., builders, etc., of Washington, 'and did thereupon knowingly seek through the said last-named firm to obtain from and compel A payment by the said firm of Bateman & Co. ON their said acknowledgment,' thus attempting to commit a *wrong* upon the said Bateman & Co. The findings do not show that this instrument was commercial paper by mercantile usage in the District of Columbia, nor that it passed to Bright, Humphrey & Co. as negotiable paper in good faith before it had become due and for a present consideration, nor do they show that claimant was insolvent and unable to respond to Bateman & Co. in whatever damages they might recover for their alleged advances to him. Therefore, according to the findings, Bright, Humphrey & Co. acquired no greater right or equity than the claimant himself possessed, and whatever defense could be set up as against him could be set up as against them. Inasmuch, then, as there was a balance remaining due to the claimant and (as the court found) the purpose of the assignment was to obtain from and compel A payment by Bateman & Co. ON their said acknowledgment,' and inasmuch as the claimant had an unquestionable legal right to compel such a payment and Bright, Humphrey & Co. could compel nothing more, this Court is unable to perceive that a 'wrong' could have been done by the assignment."

The Court of Claims thus reaches the conclusion that no *wrong* was committed or could have been committed upon Bateman & Co. by the transfer of the due bill and the institution of suit, to collect the balance admitted to be due thereon. At page 42, however, they say:

"But while the Court has carefully discarded all matters in the findings which cannot in its opinion constitute an

offense, it still appears that the claimant had prolonged and involved business transactions with these bankers not altogether consistent with the duties of his most responsible military position; that these transactions were so conducted as to require a lawsuit to bring them to an end and to subject him to public charges of fraudulent practices; that while under these charges he withdrew the suit against the party who made them apparently in consideration of his withdrawing the charges against claimant; that when the letters charging the fraud and withdrawing the charges were referred to him for explanation he neglected to clear up the matter, and, on the contrary, gave an explanation which was uncandid and evasive, compelling the Secretary of War to take further steps toward removing the shadow which had fallen on the reputation of the army and involving the Government in the expenses and inconveniences of a court of inquiry and a court-martial, and when an officer of whom he knew little or nothing came to him to raise money on his pay accounts for months in advance he introduced him to his own bankers apparently without words of caution and directly aided and countenanced a practice which must seriously interfere with an officer's freedom of action and military efficiency.- This Court cannot say that these acts were not prejudicial to good order and military discipline, and accordingly must hold that they are sufficient to uphold the charge."

It is submitted that the Court of Claims in these last utterances in their opinion ignore the charges before the court-martial and the findings of said court and their own findings of fact, and from assumed facts construct a theory that such assumed facts were sufficient to sustain the charge of conduct to the prejudice of good order and military discipline.

There is nothing alleged or found by the court-martial that justifies or even lends coloring to the assumption that appellant had prolonged and involved business transactions inconsistent with his military position.

His entire dealings are set out in the findings of the court of inquiry (Rec., pp. 8, 10, as alleged in the first specifi-

cation, Rec., p. 14) which certainly do not show prolonged transactions inconsistent with the honor or dignity of any man or officer of the army.

How could appellant properly do otherwise than to bring suit when he found himself being swindled by an unscrupulous knave and how could he prevent such a person from writing to the Secretary of War making false accusations in his attempt to cover up his frauds against appellant?

That the President and Secretary of War should, on the strength of a mere unverified letter which bore on its face unmistakable evidences of falsehood and over appellant's denial and after the person making them had withdrawn them, conceding they had been made under a misapprehension of facts, immediately proceed with an investigation by a court of inquiry, and when the court of inquiry reported the facts substantially as appellant had stated them, showing no possibility of wrong, persist in the trial of appellant by court-martial on comparatively new charges adroitly constructed to conceal the truth, is, to say the least, incredible.

The withdrawal of the suit on the note and the reference of the whole subject of differences embraced in the suit to arbitration was certainly an ordinary and very proper proceeding, and it is not seen how this could have had the effect stated by the Court of Claims.

Nothing that appellant has done or said and with all the light thrown on the subject then and since indicates a desire on his part to suppress the facts as given in his endorsement explaining the transaction to the Secretary (Rec., p. 16) and as set forth in the report of the court of inquiry (Rec., pp. 8, 10) quoted above. Certainly the assumptions or conclusions of the Court of Claims are unauthorized and without foundation, being wholly unsupported by their findings of fact.

The only fault in appellant's explanation complained of by the Secretary of War in his letter to the President was that

it did not go sufficiently into the details. There was no intimation that it was evasive and uncandid, and certainly no such question was submitted to the court of inquiry nor was any such thing even intimated in their report of facts.

As the court-martial found there *was no fraud* committed or intended and no false statement made, and the Court of Claims say in their opinion that there was neither fraud nor wrong in the transfer of the note and the institution of suit thereon, it is difficult to understand wherein evasion or uncandidness was practiced or intended on the Secretary of War, and yet the Court of Claims toy with these words when there is nothing anywhere pointed out in the transactions lending warrant for the use of them.

Notwithstanding the Court of Claims sifted the facts with great minuteness, they do not indicate in what respect appellant was uncandid and evasive. The indefinite signification of the words evasion and uncandidness, however, made them a convenient instrument in the hands of the accuser and prosecutor and a majority of the illegally constituted court-martial to stigmatize appellant.

Comparing the language of appellant's said endorsement with the four particulars thereunder alleging evasion and uncandidness heretofore examined dispels the mist clinging about these words, and shows the true character of this case to have been nothing more nor less than a merciless persecution of appellant.

To any one familiar with this case it is impossible to discuss it and use language suggestive of a belief that the strange and exceptional incidents of this trial were due to poor judgment and plodding dullness. It was an usurpation and abuse of power without precedent and without parallel in the history of courts-martial in this country.

Appellant is well aware that there were officers upon that court who could not be influenced by any consideration whatever to other than according to the high behests of justice, and with the action of the full minority of that court-martial, whatever it was, he is satisfied ; but the action

of the majority was lawless and without justification or excuse.

There is no allegation or intimation to be found in the entire record that Bateman & Co. were appellant's bankers at the time Colonel Morrow went to them to raise money on his pay vouchers except in the opinion of the Court of Claims.

Of the matters relating to the Morrow pay vouchers appellant *was acquitted*, and they have no place here as a basis to sustain the charge of conduct to the prejudice of good order and military discipline. The foundation for that charge, in the view of the court-martial, depends entirely upon the transfer of the due bill and the suit instituted thereon in connection with statements contained in appellant's endorsement in explanation of the transactions leading up to the suit, the form and character of the instrument known as the due bill, and the efforts made to secure payment and settlement thereof. The two specifications found by the court-martial relate entirely and exclusively to these matters and have no reference to the matters specified in the enumeration of supposed derelictions going to sustain the charge in the opinion of the Court of Claims. The article of war under which appellant was found guilty and sentenced for violation thereof provides as follows:

"All crimes not capital and all *disorders* and *neglects* which officers and soldiers may be guilty of *to the prejudice of good order and military discipline*, though not mentioned in the foregoing article of war, are to be taken cognizance of by a general or a regimental, garrison, or field officer's court-martial, according to the nature and degree of the offense, and punished at the discretion of such court." (Article of war 62, Rev. Stat., § 1342.)

The facts must show conduct to the prejudice of good order and military discipline in order to justify a conviction and sentence under the article. The private business transactions of appellant with Bateman & Co. were altogether too distant from the military service to affect its discipline.

The expenses and inconveniences of a court of inquiry and court-martial, as stated by the Court of Claims, rested entirely with the Secretary of War and President, who rushed to these expedients upon insufficient grounds without consulting the wishes of appellant. It is not believed, however, that the interests of good order and military discipline were in any manner bettered by the action taken. On the contrary, it has made the administration of military justice in the army a hiss and a by-word.

The sixty-second article of war does not empower courts-martial to legislate and adopt what they may hold to be offenses, but to take cognizance of the many kindred offenses specified in the articles of war; as, for instance, attempts to commit offenses specified in the articles of war where the proof falls short of establishing an offense described in the article, as in the case of Dynes *vs.* Hoover, 20 Howard, 16, where the court-martial convicted of an attempt to desert, the charge brought before the court-martial being the substantive offense of desertion. On this the Court of Claims say in their opinion, p. 46:

"A court-martial, therefore, in a case of these non-enumerated, undefined minor offenses is entrusted with the triple discretion of determining whether the acts proved are prejudicial to good order and discipline."

Sitting as a jury, the court-martial, of course, determines whether the facts charged are proved, but the facts set up or alleged must affirmatively appear to be to the prejudice of good order and military discipline and must be recognized as criminal within the letter and spirit of some article of war or other statute or the common law. A court-martial can go no further. It cannot originate and declare new crimes, disorders, and neglects theretofore unknown to the law, as the majority of the court-martial assumed to do in this case, and the Court of Claims seem to approve the assumption.

5th. *The Action of the President as Reviewing Officer of the Court-martial was in Violation of the Law.*

Immediately upon the court-martial having reached a finding and sentence upon the charges preferred by direction of the Secretary of War and forwarded the record to the reviewing authority, the President referred for trial to the court-martial another series of charges against appellant emanating from the same source, alleging fraud and conduct unbecoming an officer and a gentleman, under the sixtieth and sixty-first articles of war, and the court-martial having heard all the evidence for the prosecution therein (with an immaterial exception), making a *prima facie* case against appellant, he not having been permitted to present a word of defense, the President returned this first case tried for reconsideration and urging a more severe finding and sentence, with an opinion of the Attorney General in the nature of an argument on the merits of the case (Rec., pp. 23, 28), which proceedings were with closed doors and of which appellant had no notice or knowledge at the time (XIV finding of fact, Rec., pp. 31, 32). In any aspect in which this action can be viewed its enormity cannot be exaggerated, and in no civilized history can its parallel be found. The despotic assumption of the reviewing officer is only equalled by the cowardly subserviency of a majority of the court-martial.

The first sentence of the court-martial against appellant was—

"To be suspended from rank duty and pay for the period of three years." (VI finding of fact, Rec., p. 23.)

This sentence the President returned (under the circumstances above set forth) with the remark:

"For reconsideration as to the findings upon the first charge only and as to the sentence, neither of which are believed to be commensurate with the offenses as found by the

court in the first and third specifications under the first charge. The attention of the court is invited to the accompanying communication of the Attorney General, under date of the 10th instant, whose views upon the matter submitted for reconsideration have my concurrence."

The Attorney General in his "views" said, among other things (VI finding of fact, Rec., pp. 24, 25):

"If, as the court finds, the defendant did deliberately and with a knowledge of the facts seek in the manner described to perpetrate a 'wrong' upon Bateman & Co., which the court finds he sought to commit, and the 'fraud' which he was charged with seeking to commit is an exceedingly narrow one, such a 'wrong' deliberately planned and perpetrated would involve the same moral turpitude whether it were designated as a fraud or as a wrong, and in either event the offense would seem to fall much more naturally and appropriately under the classification of 'conduct unbecoming an officer and a gentleman' than in the category of offenses to the 'prejudice of good order and military discipline.' * * * The third specification charges the accused in substance with having prepared and forwarded to his official superior, the Secretary of War, a written statement in regard to the transactions referred to in the first specification and in regard to certain facts set out in two letters from A. E. Bateman to the Secretary of War, which statement by the said Swaim is charged to have been 'evasive, uncandid, and false and calculated and intended to deceive the Secretary of War.' * * * The objection to the finding of the court in General Swaim's case is therefore based upon the obvious inconsistency between the findings of fact as contained in the specifications and the graduation of the offense in the substituted charge. The action of the court, as a whole, seems to involve a serious lowering of that high standard of honor which from the earliest days has been the pride and glory of our military service and which was expressed on a memorable occasion by the great commander-in-chief of our revolutionary armies when reluctantly compelled to reprimand a brother officer in these words: 'Our profession is the chastest of all; even the shadow of a fault tarnishes the luster of our finest achievements.' The court in the present case has found the accused guilty of making

certain false statements to the Secretary of War for the purpose of deceiving that officer. [The court-martial refused to find that any statement of appellant was false and struck it out where charged; see findings.] The President, as commander-in-chief of the army, should not concede that this offense is one either trivial in its nature or against good order and military discipline alone nor as (in any sense of the words) other than as an offense 'unbecoming an officer and a gentleman.'" (VI finding of fact, Rec., pp. 24, 25, 26, 27.)

And the Attorney General was thus prepared to discuss the case, although he says he did not examine the evidence nor the propriety of the conclusions of the court as to the specifications established by it. He says:

"Indeed it would be impracticable to do so intelligently without devoting many weeks' time to the examination of more than thirty volumes of the manuscript record" [each days' proceedings called a volume].

The Attorney General does not say what was the occasion of the hurry to rush the case back to the court-martial or why the whole proceedings with the evidence should not have been examined in the usual manner of all court-martial proceedings under section 1199, Rev. St., p. 213. The urgency of the occasion entirely deflected the case from the usual and legal channels, and by a very suggestive coincidence the record reached the court for revision just at the point of time when the evidence for the prosecution had been presented in the other case and before a syllable had been uttered by the defense, and the executive influence thus brought to bear was sufficiently potential to induce the court to impose the following additional and more severe sentence—the court, however, declined to change their findings—"to be suspended from rank and duty for one year with forfeiture of all pay for the same period and at the end of that period to be reduced to the grade of judge advocate

with the rank of major in the Judge Advocate General's Department." (VI finding of fact, Rec., p. 28.)

The court thus adjudged two sentences, not having revoked or rescinded the first sentence passed. The President did not desire to carry out this sentence and returned the case to the court-martial "for a reconsideration of the amended sentence" (saying):

"It is apparent from the terms of the amended sentence that it was the intention of the court to award a punishment of greater severity and more nearly commensurate with the offenses of which the accused has been found guilty than was the penalty adjudged in the original proceedings." (VI finding of fact, Rec., p. 28.)

The court thereupon revoked its second sentence and adjudged as follows:

"To be suspended from rank and duty for twelve years and to forfeit one-half of his monthly pay every month for the same period." (VI finding of fact, Rec., p. 29.)

This last sentence was approved and ordered to be executed against appellant, but the President did not take into account the existence of the first sentence passed, which was neither annulled nor approved by the court-martial and the President. (VI finding of fact, Rec., pp. 23, 28, 29.)

The practice of returning the proceedings of a court-martial by the reviewing officer to the court for revision and correction of errors in the record is founded on the British practice of courts-martial authorized by the following provision in the mutiny act, which was in force in this country at the time and prior to the American revolution, viz:

"The authority having power to confirm the findings and sentence of a court-martial may send back such findings and sentence or either of them for revision *once, but not more than once,* and it shall not be lawful for the court on any revision to receive any additional evidence, and when the findings only is sent back for revision the court shall

have power without any *direction* to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial on revisal of the sentence, either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded."

This provision continued and was re-enacted in the British army act 1881, section 54.

In Captain Voorhees' case (Sixth Opinions Attorneys General, p. 200) Attorney General Cushing held—

"That but one revision of the proceedings of a court-martial could be had; that by the provisions of the British mutiny act, before the American revolution, this had been ordered. We have adopted the English system of courts-martial and such old statutes and practice ought to be recognized as the rule in the absence of anything to the contrary in our articles of war and regulations."

It is clear that there is not and never has been made and given to the army by authority of law a regulation empowering a reviewing officer of a court-martial to direct the court to reconsider their findings and sentence (or sentence alone). In the case of *Ex parte* Reed, 100 U. S., p. 22, this Court upheld the action of the admiral in requiring a court-martial in the navy to reconsider their sentence; the Court remarks:

"The Secretary of the Navy is authorized to establish regulations of the navy, with the approval of the President (12 Stat., 365 R. S., sec. 1547). Such regulations for the administration of law and justice were issued on the 15th of April, 1870."

With proper deference to the opinion of the Court of Claims, it will be seen that there is not even a shadow of resemblance, either in the facts of the cases or the legal principles governing them, between the case of *Ex parte* Reed and the case at bar.

The following is the history of the pretended army regulation, quoted in the Attorney General's opinion (Rec., p. 23), under which the action of the President was grounded:

In 1872 the Judge Advocate General of the army was called upon for an opinion in a particular case then pending, whether a reviewing officer was empowered to direct the court-martial to reconsider its action upon an interlocutory question and whether a witness could be recalled whose testimony had been erroneously rejected. The reply was in the affirmative. This opinion was approved by the Secretary of War and published to the army in general orders No. 82, dated August 29, 1872. In 1879 the then Judge Advocate General of the army requested that said opinion be officially withdrawn and the approval revoked in general orders, remarking:

"This opinion holds that on a reconvening by a reviewing officer of a court-martial for a correction of its proceedings witnesses previously called may be recalled and be heard to testify anew. This opinion is not held by me but the reverse."

This request was approved by the Secretary of War and was also published to the army in general orders No. 47, dated April 28, 1879. As the last order revoked the first and no regulation had ever been made on the subject, it follows that at the date of the compilation of general orders and regulations in 1881, in pursuance of said act of 1879, there was neither regulations or general orders existing on this subject.

The history of the legislation on the subject of army regulation since 1870 is as follows: By section 20 of an act making appropriations for the support of the army for the year ending June 30, 1871 (16 Stat. at L., p. 319), it was provided "that the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the army which, when approved by Congress, shall be in

force and obeyed until altered or revoked by the same authority, and said regulations shall be reported to Congress at its next session, provided that said regulations shall not be inconsistent with the laws of the United States."

By section 1, act of March 1, 1875 (18 Stat. at L., p. 337), it was provided that so much of section 20 (above quoted) as required the system of general regulations for the army therein authorized to be reported to Congress at its next session and approved by that body be, and the same is hereby, repealed, and the President is hereby authorized under said section to make and publish regulations for the government of the army in accordance with existing laws.

By a joint resolution approved August 15, 1876 (19th Stat. at L., p. 216) it was provided "That the President be requested to postpone all action in connection with the publication of said regulations until after the report of said commission (previously provided for on the subject of army reform) is received and acted on by Congress at its next session."

The next legislation on the subject was the act of June 23, 1879 (21 Stat. at L., p. 30, sec. 2), providing that the Secretary of War is authorized and directed to cause all the regulations of the army and general orders now in force to be codified and published to the army. Under this authority the two general orders above alluded to, although not existing at the time as general orders, were embraced in the codification of 1881 as a regulation and is quoted in the opinion of the Attorney General for the guidance of the President in this case as such. (Rec., p. 23.)

It will be observed that the opinion given by the Judge Advocate General only related to the question of recalling a witness to testify on the revision by a court-martial of the record, and the question of the authority of the reviewing officer to return a case for reconsideration at all is referable only to the British practice founded on the statute above quoted, which was in force in this country at the time of and prior to the revolution.

The question then resolves itself into two propositions, either one of which is equally fatal to the validity of the proceedings of the court-martial in this case, viz: If the British act above quoted is legal authority for a reviewing officer to direct a court-martial to revise their record of proceedings and such direction and revisory proceedings do not conform to the requirements of said act they are illegal and void. On the other hand, if the British act is not legal authority and there being neither statute nor regulation authorizing such revision, then the act is usurpation, and such revised proceedings are illegal and void.

There is nothing in the findings of the court-martial justifying the assumption of the President, founded on the views of the Attorney General, that a finding of guilty of conduct unbecoming an officer and a gentleman was justified upon the facts found in the first and third specifications. The views of the Attorney General were altogether hypothetical and discolored, and were admittedly not founded on the recorded facts and the law applicable thereto. The Attorney General said he did not examine the whole case, and the action of the President was founded upon the partial, exceptional, discolored, and misleading gloss of the Attorney General. The President was not informed of the whole proceedings by the Attorney General, and how could he approve or disapprove proceedings of which he was not informed?

No error of law or fact was pointed out to the court by the President and Attorney General. The action of the President was in effect a command to the court to increase the severity of the sentence at the pleasure of the reviewing officer. What would be said of a judge who should thus enter a jury-room? There is no power conferred upon the reviewing officer of a court-martial to urge or insist upon the court's finding and sentencing as he might think proper to dictate. If that were the rule the court should be abolished and remit the whole subject to the discretion of the commander,

and thus place the responsibility on some certain person. It is difficult, if not impossible, to compare exactly a court-martial with other established courts of the land, but there is said to be a similitude between court and jury and court-martial and reviewing officer. Conceding the analogy, the rule is well established that in a criminal case the court cannot direct the jury to find a verdict of guilty, even where the facts are admitted beyond dispute.

United States *vs.* Taylor, 3 McCrary, 500.
11 Federal Reporter, 470.
3 Crim. Law Magaz., 552.

"Evidence that the prosecutor by exhibiting papers at the places where the jury boarded had been attempting to bias and influence them will be sufficient to sustain a motion for a new trial; and a new trial will be granted when it appears any unfair trick or artifice had been employed resulting in a verdict in favor of the party using it."

Wharton's Criminal Pl. and Pr., §§ 828, 850, 851, 852, and authorities cited.

The action of the reviewing officer in causing or permitting the trial of the second set of charges to be proceeded with before the final determination of the first case, the submission of the views of the Attorney General to the court with closed doors, were tricks and artifices within the meaning of the above citation.

There can be no other conclusion but that both cases were thus tried together in order to lend the weight of the second prosecution to the first case to secure the conviction and dismissal of appellant at all hazards.

At page 46 of the Record the Court of Claims express doubt upon the validity of the action of the President. They say:

"The question presented by the case is believed to be a new one unless it be identical in legal effect with that which was before the Supreme Court in *Ex parte* Reed (100 U. S. R., 13). In that case there was an unequivocal offense in-

volving no discretion on the part of the court, viz., 'malfeasance in the discharge of his official duty.' In this case it was necessarily within the discretion of the court-martial to determine whether the acts constituted an offense, and, if so, its gravity, seriousness, and degree. In both cases the punishment was within the discretion of the court; in both cases the reviewing officer disapproved of the leniency of the sentence, and in both cases the court-martial complied with his recommendation and imposed a severer punishment. On the one hand, it may be said of this case that the President did not interfere with the discretion of the court; that he did not require it to impose a more severe sentence; that he merely invited it to reconsider its determination of the case and left it free to reimpose the same sentence or to impose a milder one or a more severe one. On the other hand, it may be said that the disapproval of the sentence which the court, in the lawful exercise of its discretion, had imposed did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient in effect compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom, and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law; but while the last principle is a sound one, which civil tribunals should carefully maintain, it is believed by this Court that the decision of the Court of last resort in *Ex parte* Reed is conclusive upon this branch of the case."

The difference between Reed's case and the case at bar is, in the former the action of the admiral was authorized by and in conformity to law, while in this case the action was in violation of law.

The admiral, in returning Reed's case to the naval court-martial for revision, did not employ the methods adopted in this case with a view to increased punishment. Reed's case, from the report, was returned once only for revision. He was not immediately placed on trial upon trumped-up charges of a serious character and the evidence for the prosecution heard and the Attorney General called upon by the

admiral to argue his case, giving false and discolored views on the facts and law to a court-martial unlearned in the law, and with all this before the court-martial urge it to impose a more severe punishment and repeat this order to the court so that three several sentences were passed. The facts, surroundings, and action taken in Reed's case and that of appellant's are wholly unlike, so that the same rule of law cannot be made applicable to both. Reed's case was but once returned for consideration of sentence, the grounds for which reconsideration are not stated in the report, but it is presumed the sentence was not conformable to law and regulations, whereas this case was twice returned without the authority of law or regulations simply to secure appellant's dismissal.

If, as the Court of Claims say, the President disposed of the first sentence by disapproval in returning the case the first time, that terminated the case and there was nothing further to act upon. A disapproval of a sentence is tantamount to an acquittal by the court.

13 Opinions Att'y Gen'l, 460.

And this has been the long and uniform practice of the War Department.

Digest of Opinions, J. A. G., 436.

At all events there are two sentences standing upon the record and until the first sentence is properly disposed of neither the court-martial nor President had any jurisdiction to proceed further. (VI finding of fact, Rec., pp. 23, 28, 29.)

No article of war or other statute or regulation or the practice of court-martial authorizes or empowers a reviewing officer of a court-martial to direct it to re-sentence an accused person before it when the first sentence is regular on its face and is not forbidden by nor does not transcend the statutory powers of the court. The first sentence pronounced by the court-martial in this case against appellant was such a sentence (except for the illegal and void nature

of the proceedings by which it was reached). The action of the reviewing officer in making such an order, as was done in appellant's case, was a gross violation of law. If there is any one thing settled in the jurisprudence of England and America it is that no man shall be twice punished or placed in jeopardy by judicial judgments for the same offense. The provisions of the common law and of the Federal Constitution distinctly enunciate this proposition.

Ex parte Lange, 18 Wallace, R. (S. C.), 163.

It follows as a natural and necessary sequence that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, being without authority of law, and the said last sentence having resulted from such illegal action was absolutely void, for the reason that the President's action, which resulted in said sentence, transcended the power vested in him as such reviewing officer.

This Court, in Runkle's case above cited, at page 555 uses the following language:

"To give effect to its [the court-martial] sentence it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that the sentence was conformable to law. There are no presumptions in its favor so far as these matters are concerned. Their authority is statutory, and the statute under which they proceed must be followed throughout."

In Wales *vs.* Whitney, 114 U. S., p. 575, this Court say:

"In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offense of which he is charged. He can make the objection to the court before trial. He can make it before judgment after all the facts are before that court. He can make it before the reviewing tribunal. If that court finds him guilty and imposes im-

prisonment as a part of a sentence he can then have a writ to relieve him of that imprisonment. If he should be deprived of office he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped in whole or in part he can do the same thing."

This case is brought for the recovery of pay and allowances in money, and the statutory bar of six years had not interposed when the suit was brought. Appellant has been deprived of all his allowances for quarters, fuel, and forage under the third and last of the sentences pronounced by the court, which, by the terms thereof, only reach one-half of his pay proper.

The rule followed by the War Department is that a sentence sf suspension of an officer from rank and pay does not affect allowances which are no part of his pay.

Judge Adv. Gen'l's Digest, p. 470.
6 Opinions, 200.

The Court of Claims preface their opinion with the following broad statement (p. 32):

"When a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws wholly inconsistent with the principles which measure our constitutional rights. He also submits himself to the administration of justice by military tribunals whose power extends to fines and forfeitures, to the deprivation of rank and pay, to imprisonment, and even to punishment by death."

"Abandon hope ye who enter here."

It is submitted that when a person enters the military service he does not surrender any of his constitutional rights; he assumes the additional obligations due to military service under the express provisions of the articles of war and other statutes supplementary thereto, all of which must conform to the fundamental law. If, however, persons in the mili-

tary service were subjected to the kind of jurisdiction defined in the opinion of the Court of Claims in this case, then, indeed, on entering the military service all rights are forfeited. The Court of Claims hold in their opinion or lend countenance or approve the doctrine that an accusing officer may appoint a court-martial, notwithstanding the provisions of the seventy-second article of war, without restriction in the composition or membership of the court, and that such court, when assembled, may legislate on what is or is not criminal, regardless of the law of crimes and punishments, and thus institute a new criminal code independent of the articles of war, and that the power of the reviewing officer is absolute or practically so and beyond the control of the civil courts of the land to correct. If this be the law, then persons in the military service stand on dangerous ground and all rights are indeed surrendered to this irresponsible military despotism discovered by the Court of Claims.

I do not desire to pursue this theme further than to say, however guilty an accused person may be in the military service, it is believed that the articles of war provide for a fair and impartial trial by a court of his peers upon charges recognized by the rules of law as violations of the military code.

This is a government of laws, and sovereignty rests with the people. The Government is the will of the people expressed in written laws. Officers of the Government, from the highest to the lowest, are but servants of the people. The restraining influence of the law encompasses the highest as well as the lowest. None, however exalted, may disregard its obligations, and none so humble but may claim its protection.

It is respectfully submitted that—

1. The President, and the Secretary of War, acting for the President, were the accusers and prosecutors of appellant before the court-martial, and, being such accusers and pros-

ecutors, the President had not, nor the Secretary of War acting for the President, the power and authority in law to select and appoint the members of the court-martial for the trial of appellant on said charges and finally to review the proceedings of said court-martial; and for the reason stated such proceedings are absolutely void.

2. Lieutenant General Sheridan, commanding the army at the time, was appellant's commanding officer, and said Sheridan was not the accuser or prosecutor of appellant. Therefore the President had no power or authority of law to appoint the court-martial for the trial of appellant, and a court-martial so appointed is not legally constituted, and the proceedings of such court are wholly void.

3. The question at issue on which the conviction rests was the attempted settlement of a disputed account growing out of a purely personal and ordinary business transaction in no way connected with the military service and involving no offense, civil or military. Of all that bore a semblance of a military offense appellant was acquitted. Hence the court-martial, even if legally constituted, being a special military tribunal of criminal jurisdiction only, had no jurisdiction to try and determine such question.

4. It is submitted that of every charge which rose to the dignity of an offense appellant was acquitted, and the findings of the court-martial do not show that any offense known to the military or civil code had been committed or attempted by appellant, and therefore the court-martial had no jurisdiction to pronounce the sentence, which is therefore void.

5. In addition to the errors in the proceedings, the illegal and arbitrary rulings of the court-martial against the appellant on material questions as above fully set forth; the appointing of officers inferior in rank to appellant on the court to try him when it could have been avoided, and

the action of the President as reviewing officer, after the court-martial had reached a finding and pronounced its sentence, in repeatedly returning the proceeding to the court, confessedly not for the correction of any errors or irregularities in the record, but obviously with the intent and purpose to direct the court to find appellant guilty of conduct unbecoming an officer and a gentleman, and with the power and influence of his great office to control the court-martial in the matter of their finding and sentence. The undoubted result of this arbitrary and illegal action was the sentence which is being executed and which is void because pronounced by a court-martial not legally constituted and in the exercise of jurisdiction not conferred upon it and which was controlled illegally and arbitrarily by the President of the United States.

6. Appellant is now and has been ever since the 24th day of February, 1885, not only deprived of one-half of his pay, but, in addition, all of his allowances, notwithstanding by the terms of the sentence one-half of his pay only is forfeited.

DAVID G. SWAIM,
Judge Advocate General, U. S. A., Appellant.

165-553

165-353

Court, U. S.
D.
DEC 11 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1896.

No. 33.

DAVID G. SWAIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

J. H. GILLPATRICK,
Of Counsel for Appellant.

KETCHESON & REEVES, PRINTERS, LEAVENWORTH, KANSAS.

In the Supreme Court of the United States

OCTOBER TERM, 1896.

No. 33.

DAVID G. SWAIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT FOR APPELLANT.

David G. Swaim, the appellant, Judge Advocate-General of the Army of the United States, commenced this action in the Court of Claims to recover his pay and allowances, withheld by the government under the sentence of a general court-martial.

General Swaim, residing at Washington, in the discharge of the duties of his office during the years 1881–2–3–4, had business relations with Bateman & Co., brokers of that city, and a dispute arising, suit was commenced against Bateman & Co. on a certain written obligation, assigned by him. (Rec., p. 5.) Without pleading to the cause of action thus begun, A. E. Bateman, of the firm of Bateman, wrote the Secretary of War that General Swaim, appellant, had committed a fraud

on his firm by sueing the same on a due bill that had been paid in full. He afterwards withdrew the charge made against General Swaim—the "suit having been withdrawn, and the differences between General Swaim and myself satisfactorily settled." (Rec., p. 15.)

The complaint of the man Bateman was referred to General Swaim, who replied to the Secretary of War, explaining the status accurately from a legal point of view. (Rec., pp. 5–6–16.) Charges were preferred against appellant, and a general court-martial was, by direction of the President, appointed for the trial of the accused the 22d of April, 1884. (Rec., pp. 10–11.) The appellant entered his plea to the jurisdiction of the court-martial for that, the accused could not be tried by a court appointed by the President except when the commander—the Lieutenant-General of the Army—of the accused was the accuser, and that the court so convened by the President had no jurisdiction under the 72d article of war. (Rec., pp. 10–11.)

The plea was overruled and the court found on the charges, as appears (Rec., pp. 18–23), sentencing the accused "to be suspended from rank, duty and pay for the period of three years." (Rec., p. 23.) This was returned to the court by the President February 11, 1885, "for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be COMMENSURATE with the offences as found by the court, etc.," (Rec., p. 23) the President in the same paper at the same time saying, "The attention of the court is invited to the accompanying communication of the Attorney-General, under date of the 10th instant, whose views upon the matter submitted for reconsideration have my concurrence." (Rec., p. 23.)

The court found the accused not guilty of a fraud, and not guilty of conduct unbecoming an officer and a gentleman, as charged, but guilty under the 62d article of war. The Attorney General says (Rec., p. 24, findings and sentence of the court): "I find it difficult to reconcile this conclusion with any recognized standard of either officer-like or gentleman-

like conduct; and it can be only so reconciled by annexing to the words * * a narrow and very limited significance, in my judgment wholly incommensurate with the proper and reasonable import of those words." "It is not improbable that the argument upon this point of the learned and able counsel for the accused may have produced more than an ordinary impression upon the minds of the court." * * "While it may be true that the position of the learned counsel has not been without some countenance, I do not think it should receive the official sanction of the President of the United States." (Rec. p. 26.) * * "The action of the court as a whole seems to involve a serious lowering of that high standard of honor, which from the earliest days has been the pride and the glory of our military service." * * The President, as commander-in-chief of the army, should not concede that this offence is one either trivial in its nature or against good order and military discipline alone, nor as (in any sense of the words) other than as an offence "unbecoming an officer and a gentleman." (Rec., p. 27.) The Attorney-General says in conclusion: "If the President should decide to approve the findings and sentence of the court as they now stand, I see no objection to the mere form of the sentence." (Rec., p. 28). The court having reconsidered its former action, adhered to its finding upon the first charge, remarking thereon as follows: "The court, upon mature reconsideration, has not found the accused guilty of such degree of wrongful or deceitful conduct as to justify a finding of guilty of conduct unbecoming an officer and a gentleman, and has therefore respectfully adhered to its finding upon the first charge." But adjudged the following sentence: "To be suspended from rank and duty for one year, with forfeiture of all pay for the same period, and at the end of that period to be reduced to the grade of Judge-Advocate with the rank of Major in the Judge Advocate-General's Department," and this without revoking the first sentence by the court (Rec., p. 28). This second sentence was returned by the President, February 14, 1885, in these words: "The record in the foregoing case of Brigadier-

General David G. Swaim, Judge-Advocate General United States Army, is hereby again returned to the general court-martial before which the proceedings have been had for a reconsideration of the amended sentence as set forth in the proceedings had upon reconsideration of the original findings and sentence." "It is apparent from the terms of the amended sentence that it was the intention of the court to award a punishment of greater severity, and more nearly commensurate with the offences of which the accused has been found guilty than was the penalty adjudged in the original proceedings." But the President points out that the second, or amended sentence as he designates it, is "impossible of enforcement," and thereupon the court revokes the second sentence, and proceeded to re-sentence, and for the third time, as follows: "To be suspended from rank and duty for twelve years, and to forfeit one-half his monthly pay every month for the same period."

The Court of Claims, in its opinion (Nott, J.), Rec., 32 to 47, says, among other things: * * "When a person enters the military service, whether as officer or private, he surrenders his personal rights, and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights." (Rec. 32.) * * "Among the objections which are now taken to the proceedings of the court-martial are the following:" and the court mentions five specific objections (R. 33), which are omitted for the purposes of this brief, the court here being referred, for consideration of the same, to the personal brief of the appellant, filed and presented in the case. The court proceeds: "There are, however, other objections raised, which are more difficult in determination, and the first of these goes to the constitution of the court. It is contended that "there was no law authorizing the appointment of the court-martial;" that is to say, "the appointment of a general court-martial" by the President. "The order convening the court runs in these words: War Department, Washington, June 30, 1884. By direction of the President, a general court-martial is appointed to meet in this city at 11 o'clock A. M., on Wednesday, the 10th day of

September, 1884, or as soon thereafter as practicable, for the trial of such persons as may be brought before it." (R. 33.) The opinion continues:

"The position of the claimant is that the President had power to appoint a court-martial only in the single instance named in the 72d article, as it stood; and the Lieutenant-General (under whose immediate command the claimant was) not being his 'accuser or prosecutor,' a case had not arisen in which the President could so act." (R., pp. 34–35.)

The Court of Claims evades the position maintained by appellant upon the ground that, construing the 72d article of war to authorize the President to convene a general court-martial only when the Commanding General is the accuser, would leave the Commanding General himself beyond the reach of punishment by court-martial.

Proceeding, the Justice rendering the opinion (Nott, J.), says:

"We come now to a more difficult part of the case—the question whether the sentence of this court-martial was authorized by law. The charge against claimant was 'conduct unbecoming an officer and a gentleman,' and rested on the averment that the claimant had defrauded, or attempted, or intended to defraud a firm of private bankers in Washington, doing business in the name of Bateman & Co. * * If no fraud was committed, or attempted, or intended to be committed, there was no ground primarily for the charge. The matter was brought before the Secretary of War from one of the firm, in which he says: * * 'I stand ready to prove the said D. G. Swaim has committed a fraud,' &c. 'I am further ready to prove the said D. G. Swaim assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent,' &c. As to this last charge, assisting to negotiate, &c., it is now out of the case, for upon it the claimant was found 'Not Guilty.'" (R., 38.)

"With this last charge taken out of the case by the acquittal of the accused, it must be remembered that the serious offence * * depended upon the question of a fraud upon Bateman & Co. by the claimant. The specifications do indeed aver that his reply to the Secretary of War was evasive, uncandid and false. * * But the falsity of the reply depended upon the fraud charged in the first specification.

If there was a fraud practiced upon Bateman & Co., then the reply was false; if there was no fraud practiced, there was little or nothing to be false about." "It is manifest that the court-martial intended to find, and found, that no fraud had been practiced or attempted, and when that conclusion was reached the charge of conduct unbecoming an officer and a gentleman fell. * * In the present case, the court is obliged to pass upon acts which transgress no statute or rule of the common law. * * The cases which involve conduct to the prejudice of good order and military discipline are beyond the bounds of ordinary judicial judgment. * * On looking into the record in the present case we find legal references and conclusions which do not seem to be warranted by the facts found, and matters of which the claimant was found guilty, that certainly cannot affect directly or indirectly the good order or military discipline of the army. The court-martial refused to find that the claimant attempted to commit a 'fraud' upon Bateman & Co., and substituted for 'fraud' the word 'wrong.' * * The findings show that the claimant had due him a balance of $33.89, * * and assigned a due-bill to Bright, Humphrey & Co., and seeks through them payment on the acknowledgment, thus attempting to commit a wrong." * * "According to the findings, Bright, Humphrey & Co. acquired no greater right or equity than the claimant himself possessed, and whatever defence could be set up as against him, could be set up against them." "Inasmuch, then, as there was a balance remaining due to the claimant, and (as the court found) the purpose of the assignment was, 'to obtain from and compel a payment by Bateman & Co. on their said acknowledgment;' and inasmuch as the claimant had an unquestionable legal right to compel such payment, and Bright, Humphrey & Co. could compel nothing more, this court is unable to perceive that a 'wrong' could have been done by the assignment." The court then holds that "while the court has carefully discarded all matters in the findings which cannot, in its opinion, constitute an offence, it still appears that the claimant had involved business transactions with these bankers NOT altogether consistent with the duties of his military position; that these transactions were so conducted as to require a law suit to bring them to an end; * * that referred to him he neglected to clear up the matter, and * * gave an explanation which was uncandid and evasive, compelling the Secretary of War to take further steps toward removing the shadow which had fallen upon the reputation of the army, and involving the government in the expenses and

inconveniences of a court of inquiry and a court-martial. * * This court cannot say that these acts were not prejudicial to good order and military discipline; and accordingly must hold that they are sufficient to uphold the charge." (R., 40–42.)

"We now come (says the court) to the most complex and difficult question of the case, a question concerning which the court has entertained serious doubts, that prolonged deliberation has not wholly removed. The question of fraud being out of the case and the court-martial having properly acquitted the claimant on the charge of conduct unbecoming an officer and a gentleman, imposed sentence. (Suspension from rank, duty and pay for three years, as stated above.) The record then went to the President and was by him referred to the Attorney General." "The President returned the record (as stated above)." "The President also communicated to the court the opinion of the Attorney General, whose views, he added, 'upon the matter submitted for reconsideration have my concurrence.' 'In this opinion,' says the Court of Claims (R., 43), 'the Attorney General regards the facts found as being equivalent to those charged in the specifications, AND HE STERNLY CENSURES THE RESULT REACHED IN THE SENTENCE.' * * The court-martial, notwithstanding the strictures of the Attorney-General, properly adhered to its determination that the facts found do not constitute the offence charged, but it imposed a second sentence (suspension from rank for one year, with forfeiture of all pay for the same period, and reduction to the grade of judge advocate with the rank of major, as stated above). R., 43. This sentence the President likewise disapproved. The court a third time deliberated and then imposed the sentence, which was approved by the President and carried into execution, and which the claimant now attacks. It is: 'To be suspended from rank and duty for twelve years and forfeit one-half his monthly pay every month for the same period.'" (Opinion of the court, Rec., p. 44.)

Assignments of Error.

I

The court erred in holding that the court-martial was lawfully ordered by the President of the United States, when the Lieutenant-General commanding the army was the commanding officer of the accused, and was not his accuser, and when the 72d article of war provided that, "Any general officer, commanding the army of the United States * * shall be competent to appoint a general court-martial. * * But when any such commander is the accuser or prosecutor of any person under his command, THE COURT SHALL BE APPOINTED BY THE PRESIDENT, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case." (Rev. Stat. ch. 5, p. 237, Art. 72.)

II.

The court erred in overruling the plea of the appellant to the jurisdiction of the general court-martial, for that, the President could only convene a court-martial when the commanding officer of the accused was his accuser.

III.

The court erred in holding that the appellant was properly, or could on the facts, be found guilty of any violation of the 62d article of war, or of conduct prejudicial to good order or military discipline, and in not holding that the charges and specifications against appellant were groundless, and rested on supposititious and frivolous pretexts.

IV.

The court erred in holding the third sentence of the court-martial valid, as under the law, regulations and practice, revision is allowable but ONCE, and never for a severer sentence, and the only recognized purpose of such revision is to

correct mistakes or to modify the former action of the court-martial. (VI Opinions Atty. Gen'l, p. 200, citing British Mutiny act adopted here.) "The authority having power to confirm the findings and sentence of a court-martial may send back such findings ONCE, BUT NOT MORE THAN ONCE. * * Nor shall the court-martial on revisal of the sentence * * have the power to increase the sentence awarded." It was awarded under undue influence; the court-martial was not left to the exercise of its discretion, and the proceeding was not due process of law.

V.

The court should have held the sentence of the appellant void, for, if the court-martial had jurisdiction, it had already awarded sentence, which was not subject to change, except to correct a mistake or in mitigation, when, in fact, the court-martial was subjected to an *ex parte* argument by the Attorney General, for the prosecution, placing appellant twice in jeopardy.

VI.

The court erred in not holding that the final sentence by the court-martial was void, as the same was the result of indirect control by the President and not rendered in the discretion of the court; because, conceding the jurisdiction or authority of the court, the first stands unrevoked and was regular and could have been approved, as the Attorney General advised, but was returned for revision and a severer sentence, and was not a finding and sentence by due process of law.

1st. The court was ordered without authority, the President having no power to convene a court-martial except as provided in the 72d article of war, which is the only provision contained in the laws of Congress on the subject. The article is as follows:

"Any general officer commanding the Army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President for his approval or order in the case." (Rev. Stat., 1342, Art. 72.)

The opinion of the court below on this point rests on a limited conception of the exclusive authority of Congress "to make rules for the government and regulation of the land and naval forces;" (Con., Art. I, Sec. 8, 14.) and the theory, that if the President cannot order a court-martial, the Lieutenant General of the army would be beyond the reach of such punishment. It is not by views so specious that great principles can be overthrown. Perhaps as good an exposition of the law on this subject is found in *ex parte* Milligan in the opinion delivered by the then Chief Justice of this court:

"The power to make the necessary laws is in Congress; the power to execute, in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, INSTITUTE TRIBUNALS FOR THE TRIAL AND PUNISHMENT OF OFFENCES, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at

least insures acts of indemnity from the justice of the legislature."

Ex parte Milligan, 4 Wallace, pp. 139–140.

But the argument-opinion of the Court of Claims is, that since it were impossible to punish by court-martial the commander of the army, under the construction contended for by appellant, the 72d article of war must be construed to give authority to the President to appoint courts-martial in any and all cases, as that must necessarily have been the intention of Congress in making the law.

In other words: There might be a time when the appointment of a court-martial outside the statute would be necessary, therefore it may be done at any time.

(*a*) If the plain construction of the constitutional provision that Congress shall "make rules for the government and regulation of the land and naval forces," is to be set aside because there is an instance where the laws made may be defective, then we justify the courts and the executive in violating a plain enactment to adapt it to an imaginary future necessity or convenience. It is maintained that the 72d article should be followed where practicable and future contingencies be left to take care of themselves.

The court martial is a court of limited jurisdiction, with powers of remarkable, if not in practice, of unlimited severity. Well may this court, and all other tribunals, hold that such courts can only exist when convened in strict compliance with the statutory authority. In Runkles' case, 122 U. S., 555, the court says:

"To give effect to its (the court-martial) sentence, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that the sentence was conformable to law. There are no presumptions in its favor so far as these matters are concerned. Their authority is statutory, and the statute under which they proceed must be followed throughout."

The rights of the appellant to a trial by a court-martial, according to the principles stated, is as certain as the right of any citizen to any provision of the fifth amendment or any and every other article of the Constitution. The language of Justice Davis, in *ex parte* Milligan, is as applicable to the rights of General Swaim as his words were apt and felicitous in defining the rights of that petitioner to a jury trial: "This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political NECESSITY." (*Ex parte* Milligan, 4 Wallace, 123.)

U. S. vs. Fletcher, 148 U. S., 84.
Dynes vs. Hoover, 20 Howard, 65.
Greenleaf Ev., Vol. 3, Sec. 470.
Att'y Gen'l Crittenden, 5 Opinions, 508.

(*b*) The spirit and the redeeming feature of this military law—law of courts-martial—is lost sight of in placing the organization of the court in the hands of the reviewing officer. The theory that gives to an accused person the right of presenting errors to a reviewing authority is swept away by the procedure in this case. In all cases where the officer accused is subject to dismissal, &c., the sentence cannot be enforced till the approval of the President is had, as in all trials of general officers. Dismissal from service was the special object aimed at, and yet the whole business is begun by the ordering of a court by the President, who alone could afford any relief on review for errors committed during the trial.

In the cases presented to this and other courts by those restive under the sentences of courts-martial, we find ever and again the unfeigned regret that the judicial eye must be closed to errors that were more than sufficient to reverse the action and judgment of the trial court at common law, but since it cannot act as a reviewing court, the court hearing such a petition can only inquire if there was jurisdiction, &c., and relegates the victim to the consolations of religion, or such solace as may be found for the disasters of a blasted life. Always, it

is repeated, that objections could have been made before the court and the reviewing officer. In Wales vs. Whitney (114 U. S., 575), the situation is best explained:

"In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offence of which he is charged. He can make it before judgment, after all the facts are before the court. He can make it before the REVIEWING TRIBUNAL. If that court finds him guilty and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing."

And in this respect the policy of the articles of war is to place the President in the attitude of a court of last resort, with the function to approve, disapprove or mitigate the action of the court-martial, etc., as shown by articles 72, 99, 106, 108, 109, 111, 112, etc. R. S., 1342.

(*c*) In the case at bar the President accuses; orders the court; arrests the accused and orders him to appear before the court-martial. The court is the sole judge of the qualifications of its own members; controls its own procedure; is to punish-sentence at its own discretion, and then reports for review to the officer—the President—who ordered and accused the appellant before the court. This takes away the impartiality contemplated. It will be seen, on the slightest examination of the history of this famous trial, how far the authorities departed from all theory of a careful review to detect and prevent error, and how aggressive, on the other hand, was executive action toward conviction and dismissal from service. No more forceful example could arise to show the mischievous effects of placing the appointment of the court-martial in the hands of the reviewing authority; of combining in one hand the power to order a court, to accuse, and at the same time to review, with power to approve or not; to mitigate, or, as appears in the case, to revise until a portion of a relentless

purpose is achieved. It shows the lengths to which power dominant will go when the law is stretched to suit convenience. But it is unnecessary to amplify argument. The Court of Claims accommodates us in its opinion: "Congress has the exclusive power of constituting military courts; it can declare how these courts are to be organized, their jurisdiction, by whom, and in what manner they are to be ordered, of whom they shall consist, their forms of proceeding; in fine, Congress has full and absolute power in all things pertaining to military tribunals, and the President can in no way interfere with matters relating to these tribunals except so far as HE IS EXPRESSLY AUTHORIZED," and the court cites as special authority for this the chief horn-book of the military law ("O'Brien on Military Law"). After this, that the Court of Claims should hold that the court in this case was lawfully convened under the 72d article of war is rare presumption, and its reasoning quite unsound. (Vide Rec., pp. 34–8.)

It is submitted under this point that the case comes within the rules laid down in the case of Dynes v. Hoover, which more fully than any other lays down the law governing the court-martial, its organization and procedure: "It is beyond the inquiry of any civil tribunal (the court-martial), unless it shall be in a case * * * where having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the statute for its exercise. * * Persons then belonging to the army and navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases everything which may be done is void, and civil courts have never failed, upon a proper suit, to give a party redress. * * In England it has been done by the civil courts ever since the passage of the I Mutiny act of William and Mary, Ch. 5, 3d April, 1689. And it must have been with a direct reference to what the law was in England, that this court said in Wise v. Withers, 3 Cr. 337, that in such a case 'the court and the officers are all trespassers.' When we speak of proceedings in a cause, or for the organization of

the court and for trials, we do not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but of a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law."

Dynes v. Hoover, 20 Howard, pp. 81–82.

The Court of Claims upholds the sentence of the court-martial which was convened contrary to article of war 72, a "disregard of essentials" rendering the judgment of the court void.

2d. The third assignment of error is that no offence under the 62d article of war is shown by the facts, and that the court should have held the findings and sentence void.

It will be conceded that an officer might be arraigned and prosecuted, and found guilty on charges and specifications so "supposititious and frivolous" that conviction would be held, even collaterally, void, and if that be so, it is difficult to see how the prosecution can be sustained in General Swaim's case. The President might have removed this officer by the appointment of his successor, by and with the advice and consent of the Senate (Blake v. United States, 103 U. S., 227), and then there would have been an end of the matter. This would have been commendable, as compared with the course adopted. That would have been courageous—at least a bold use of arbitrary power. To seek the overthrow of an officer on frivolous charges and a pretended offence, under the guise of a trial, deserves some other name. To confirm what the court-martial was led to do in this case is to justify anything that may be brought about by and through such a tribunal.

It is conceded, even in the opinion of the Court of Claims, that an officer of the United States army may engage in business outside of his profession, and he must do so, in many ways, to maintain his household and respectability among men.

He may invest in securities. He may, to do this last, deal with creatures of the genus Bateman. With such men differences are not only imminent, but well nigh certain. An army officer may go to law. But it is recited that the appellant "had prolonged and involved business transactions with these bankers not altogether consistent with his most responsible military position." General Swaim brought an action against Bateman. Why he brought it; how he brought it; how he conducted or dismissed it; the nature of the transactions and the grounds of difference between him and Bateman & Co., so far as the testimony or findings of the court of inquiry or the court-martial go, did not concern the Secretary of War, and would scarcely excite the twaddle at a tea party of ancient dames. Did the chivalric spirit of the War Department fancy that being a military man, General Swaim should have settled with his adversary through the wager of battel? That was until lately an adjunct of courts-martial, and is defined to be "in the nature of an appeal to Providence, under an apprehension and hope that Heaven would give the victory to him who had the right." The court-martial could be led to find only that the appellant had committed a "wrong" upon Bateman & Co. The Attorney-General could not induce it to say fraud. Suit was begun against Bateman, and he bawled Fraud! as many another does Blackmail! etc., under like circumstances. The pretense of falsehood in replying to the inquiry of the Secretary of War will not stand criticism. There was nothing to be wrong about; there was no fraud in the case. There was in fact no feature of the matter not likely to assail any man who deals, as he must, in many ways with civilians, even though an officer of rank. The suit was "to compel a payment by Bateman & Co. on their acknowledgment, and as the claimant had an unquestionable legal right to compel such a payment, etc., this court is unable to perceive that a wrong could have been done." (Rec., p. 42.) By what process of conjuration can any violation of the 62d article of war be brought forth from the facts found? The court cites as justification for sustaining the findings of the court-martial the Fletcher case (Rec., p. 40); but

that was a case where the officer refused to pay money due. Here the officer appeals to a court of justice to compel a debtor to pay HIM! but he must not have transactions so "involved" as to "require a lawsuit to bring them to an end."

To sustain the prosecution on the facts presented in this case were to establish the rule that a man may be pursued who proves disagreeable to his commanding officer, his associates, or the President. Then, if that is to prevail, let the President take the responsibility and remove by appointment to take the officer's place and send it to the Senate for its concurrence. To remove on "supposititious and frivolous" grounds, is to set up usurpation and abuse in place of law.

3d. The IV, V and VI assignments of error will be considered together, and are aimed at what is believed to be not mere irregularities in practice, but so far a "disregard of the essentials" (Dynes v. Hoover, 20 How. 82), that the sentence of the court-martial should be held void.

(*a*) The rendering of the findings and the sentence by the court-martial in the first instance marked the point where the trial of the accused ends, so far as his being placed in jeopardy goes. After that no new evidence can be introduced; no further argument can be made or other steps taken by way of prosecution. A mistake may be corrected, as in a case before a court of common law jurisdiction, and as contemplated by the rules regulating courts-martial, but nothing more can be done without depriving the accused of his right to protection under statutory and constitutional law. It is maintained that no valid regulation exists in the army of the United States touching revision by a court-martial, and that such power is referrable to the following provision of the British mutiny act:

"The authority having power to confirm the findings and sentence of a court-martial, may send back such findings and

sentence, or either of them, for revision ONCE, BUT NOT MORE THAN ONCE, and it shall not be lawful for the court on any revision to receive any additional evidence, and when the findings only is sent back for revision, the court shall have power without any direction to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial on revisal of the sentence either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded."

Returning the proceedings of the court-martial first reported to him, the President accompanies his disapproval with a communication from the Attorney General, in which, after he "sternly censures" the court—to use the word of the Court of Claims—he says: "If the President should decide to approve the findings and sentence of the court as they now stand, I see no objection to the mere form of the sentence." (Rec., p. 28.) The purpose plainly was to secure a severer finding of fact and sentence; conviction under the 61st article of war, and a dismissal from the service, while the action by the court-martial, in its discretion, was conceded to be regular and the proper subject of approval. This course is opposed to the true principle controlling revision in military courts-martial. The regulation of the procedure in such cases, cited by the court of claims, is as follows:

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, PROCEED TO REMEDY THE ERRORS pointed out, and may modify or completely change its findings. THE OBJECT of reconvening the court in such a case is to afford it an opportunity to reconsider the record FOR THE PURPOSE OF CORRECTING OR MODIFYING any conclusions thereupon, and also to make any amendments of the record necessary to perfect it." (Army regulations, 1881, Sec. 923.)

This regulation, it is contended, is not the law governing revisions by courts-martial, and reference is made to the personal brief of appellant (pp. 57 to 62), for a full discussion of

the question; but even if so held, it contemplates, even as the provision in the mutiny act above quoted, only a revision to correct errors or to modify what was already done. The Court of Claims well says (Rec., p. 46):

"But it is clear to the court that a regulation, as its name imports, is to regulate and guide proceedings under the law, and not to make or override the law. The purpose of this regulation is well illustrated in the proceedings which followed the second sentence; that is, where a court-martial has inadvertently imposed a sentence impossible of execution, to bring the obstacle to the attention of the court so as to enable it to correct its error. The regulation was not intended to confer upon the reviewing officer power to interfere with the proper discretion of a court, or to require it to do that which he could not himself do—increase the severity of a sentence."

The court continuing, says: "The question (that presented by appellant) presented by the case is believed to be a new one, unless it be identical in legal effect with that which was before the Supreme Court in Exparte Reed (100 U. S. R., 13)."

(*b*) The contention—the fundamental defect in the action of the reviewing authority—lies in this, that the discretion of the court-martial was so far interfered with, was so controlled and directed, that the accused was deprived of a trial and deliverance by the tribunal before which he was arraigned. It is unnecessary to argue that courts-martial are governed by the general principles of the common law, chief among which is the right of the jury to judge of the facts, and of the amount of punishment where that is left to the jury. The court-martial is sworn to "well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the prisoner to be tried; * * to duly administer justice, without partiality, favor or affection, * * and if any doubt should arise * * then according to your conscience, the best of your understanding, and the custom of war in like cases" (Art. 84); and making findings under the 62d article of war, as in this case, an offence must be treated "according to the nature and degree of

the offence, and punished AT THE DISCRETION OF THE COURT." (Art. 62, R. S., 1342.) The President returned the record to the court martial "for reconsideration as to the findings upon the first charge only, and as to the sentence, neither of which are believed to be commensurate with the offences as found by the court in the first and third specifications under the first charge. The President also (Opinion Court of Claims, Rec., p. 43) communicated to the court the opinion of the Attorney-General, "whose views," he added, "upon the matter submitted for reconsideration have my concurrence." In this opinion the Attorney-General regards the facts found as being equivalent to those charged in the specifications, and he STERNLY CENSURES the result reached in the sentence. (Rec., p. 43.) The Court of Claims says further: "The court-martial, notwithstanding THE STRICTURES of the Attorney-General, properly adhered to its determination that the facts found did not constitute the offense charged, but it imposed a second sentence upon the accused." (Rec., p. 43.)

"The jury must be left free to act. The final decision on the facts is to rest with them, and any interference by the court to coerce them into a verdict against their will is irregular and unconstitutional. A judge is not justified in expressing his opinion to the jury that the defendant is guilty upon the evidence adduced." (Cooley's Con. Lim., Ch. 10, p. 320, n. 2.)

The theory of the prosecution before the court-martial was that a reviewing authority could, under the pretended regulation as to revision, send the record back for a re-sentence or re-finding of facts again and again without regard to the letter of the regulation and the terms of the mutiny act, as to revision but once, and never except to correct mistakes, or to modify findings already made, and to expand this power by the floating traditions of military law, real or imaginary.

"The law of the land does not mean a statute passed for the purpose of working wrong. That construction would render the restrictions nugatory, and turn that part of the constitution into mere nonsense. The people would be made

to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do wrong unless you choose to do it.' Any legislation that deprives a citizen of property without trial according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually 'Laws of the Land' for those purposes." (Idem, p. 354, n. I.)

These trite observations should apply to the proceedings by a court-martial, as well as to trials at common law, since an accused person of the army is entitled to "due process" of military law. The military is a summary method of law to be sure, but it has its methods at last, as it is the strictly limited creature of statute, and any essential disregard of the law by a court-martial renders its act void. (Dynes v. Hoover, 20 How., 65.) "The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and UNDER ALL CIRCUMSTANCES."

Ex parte Milligan, 4 Wallace, 120, Davis, J.

What has been cited of the action by the President and the startling "communication" of the Attorney General, is sufficient to show the interference with the discretion of the court and its conscience. The circumstances display a shocking indifference to the rights of an accused person before even a military tribunal. Power can take care of itself. It is the accused that stands in need of constitutional and statutory protection. The expression of opinion by a judge in the trial of a cause in all cases is a delicate undertaking, but in criminal cases is frowned upon by the law. No matter how plain the facts may be against the defendant, the trial judge may not say to the jury what the facts are, nor what has been proven, nor what the jury should do, even if the proof be overwhelming, with nothing to the contrary. No better exposition of the law in this respect can be found than in the case of Taylor vs. The United States, 3 McCrary, 500.

The Attorney-General's "communication" and the President's indorsement returning the record for revision, combine to control the court, both coming within the "hostile intimations" condemned in Hicks vs. The United States, 150 U. S., 442, and the "forensic ardor" in the judge's charge, in Allison vs. The United States (Sup. Ct. Rep., Vol. 16, 255).

Here, it is not a case of influencing a jury by instructions, nor a court-martial by argument, before the retiring of the court to consider of its findings, but a plain instruction, to find facts and sentence more severely than the court had done, without mistake that required correction. And thus, "by indirection we find direction out." It were "better far to dispense with jury trial altogether than for the judge to urge his opinion of the facts upon the jury, for under such a practice he decides the cause while avoiding the responsibility."

Cooley's Constitutional Limitations, 320n., 2.

"How often would a jury be found bold enough to declare their opinion in opposition to that of the judge upon the bench, whose words would fall upon their ears with all the weight which experience, learning and COMMANDING STATION must always carry with them?" (Idem.)

These primary principles suggested, it is likely, the expression of the Court of Claims upon the action of the President:

"On the other hand it may be said that the disapproval of the sentence which the court in the lawful exercise of its discretion had imposed, did not leave it free to reimpose the same sentence; that disapproving it on the express ground that it was too lenient in effect, compelled the court to impose a more severe one; that in military life a superior officer is conceded to be invested with superior wisdom; and that in such cases the reviewing officer should not be allowed to interfere with the judgment of the tribunal in whom discretion is exclusively vested by law. But while the last principle is a sound one, which civil tribunals should carefully maintain, it is believed by this court that the decision of the court of last resort in *ex parte* Reed is conclusive upon this branch of the case."

(*c*) The inference is that but for *ex parte* Reed the court below would have held the sentence void for the undue and

overruling influence exercised upon the court-martial by the reviewing authority. It is submitted, however, that that case rests on wholly different grounds from the one at bar. There the accused was convicted for malfeasance in office, and the finding of the court was revised but once. It was done also under this provision of law regulating NAVAL courts-martial recited by the court (Swayne j. 100 U. S. 539), to-wit: "In case of conviction, adequate punishment is REQUIRED to be adjudged." (R. S. sec. 1624, art. 51.) No such provision as this is to be found in the laws governing the army. As has been quoted above, the accused was subject to be "punished at the discretion of such court." This makes the decision in the Reed case inapplicable to this under consideration. The court of claims says the question is a new one "unless it be identical in legal effect with that which was before the Supreme Court in *ex parte* Reed," (100 U. S. 13). As stated, the cases are far from identical, and there is one feature in the appellant's case not in the Reed case at all, and the overlooking of which marks the indifference with which courts will pass over anything and everything done in the name of a court-martial! The case in Reed's petition presented involved a SINGLE revision by the court, where the court had no discretion as to the offence, and to but one re-sentence. In this case the court is called upon (?) to re-sentence a third time. Since the President and Secretary of War failed at last in getting what was manifestly aimed at—a dismissal from the service—the marvel is that the matter was not returned yet again for still severer sentence, and until the power that inspired the prosecution, convened the court, and reviewed (?) its proceedings, was entirely gratified.

It is maintained with all confidence that the law regulating revisions by courts-martial contemplates only the correction of errors or the modifying of what has already been done, and that the mutiny act, as well as the regulation relied on by the prosecution, bear no such construction as is contended for. But, it is certainly true that no more than one revision can be tolerated. If it may be done more than once, where shall it

stop? It may be thirty as well as three times. The wise provision in the mutiny act has become a part of the law governing the army.

This is best shown in an opinion by the Attorney-General in VI of Opinions, 200:

"The British Mutiny Act ('Manual of Military Law,' English War Office, 1884, p. 393), near the middle of the last century, imposed a limit on the power of revision as it previously existed, by enacting that a revisal shall be ordered only once; whereas, before that, it was subject to be ordered any number of times, at discretion. The late Major O'Brien, in his work on Military Law, expresses the opinion that in this country the approving power may, if it feel disposed, send back the proceedings for revision any number of times. (O'Brien, p. 279.) I doubt the soundness of this opinion. The general rule is that English statutes passed before the Revolution, and in amendment of the common law, are to be assumed as a part of the common law of the colonies, (Going v. Emery, XVI Pick, 10–11); * * and although there is no principle of the common law which pervades the Union * * and has authority of the law, except such is embodied in the constitution and laws of the United States (VIII Pet. 591) still we have to go to the common law as suggestive, if not the authoritative source of many doctrines of law, the forms of practice, the general principles of reasoning, and even the very meaning of the terms of the law. And this theory applies to the jurisprudence of an exceptional forum, for instance, military or ecclesiastical, as well as the ordinary forums of law or equity. (Van Ness v. Pacard, 1, 2, Peters, 144.) I should for these reasons, as well as for general considerations hereafter stated, incline to the belief that the power of revisal here is, in this respect, under the same limitation as in Great Britain." (VI Opinions Atty.-Gen'l, p. 204.) "A court-martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider its verdict. Such is the whole current of authorities, as well in the United States as in Great Britain. * * In fact, the analogy of a court-martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of a judge in the latter. The judge remands the case to the jury

for further consideration. The verdict must be accepted by the judge, and judgment rendered accordingly." * * It is to be remembered that the power of revisal is one which involves much contingent delay and consequent hardship to the officer on trial, and therefore, IS NOT ONE TO BE FAVORED, or at least not one to be maintained in violation of any principle of general right and justice appertaining to the government of the army or navy." (Case of Captain Voorhees, VI Opinions, pp. 206–8, Cushing, Attorney-General.)

A man cannot be sentenced twice for the same offence or under the same conviction. Neither can any person be deprived of property without due process of law, and cutting off the salary of an officer is the taking of property, generally all that such a man has. He may be removed incontinently, to be sure, but otherwise it must be in due form of law.

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? (*Ex parte* Lange, 18 Wallace, 173.) * * The argument seems irresistible, and we do not doubt that the constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." *Id.*

To meet a possible view common to cases seeking relief from the acts of courts-martial, a further quotation is made from the Lange case just cited:

"A judgment may be erroneous and not void, AND IT MAY BE ERRONEOUS BECAUSE IT IS VOID," which is insisted upon as the law of this case at bar. (*Id.* 175.) "It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

The appellant was denied due process of law; he was twice placed in jeopardy; the court was ordered without authority, and the judgment should be that he recover on his petition, and the court be directed to proceed accordingly.

The appellant is subjected to a judgment based on the proceedings of a court convened without authority and void. If the court could take jurisdiction, then it denied the accused due process of law, disregarding essential matters in its procedure, and twice placed the accused in jeopardy. The facts constitute no offence cognizable by military law.

On frivolous facts the President is the accuser. He convenes a court to try the accused, and must, *ex-officio*, review the findings and sentence of the court. He orders a revision and a re-revision to secure a severer sentence. This combines functions obnoxious to the letter and philosophy of the law. It leaves the appellant the victim of direct executive persecution, ending with the whim of the individual. The first sentence—to say nothing about the illegality of the court—would, if approved, have shocked the legal mind at such a carving out of an offence on the facts under the 62d article of war. But the third sentence, so clearly the result of one capricious will, is alarming! "Whatever has its origin in caprice is sure not to improve in progress, nor to end in reason." (Works of Edmund Burke, Vol. V., p. 459.) It is submitted, that the trial of appellant was without authority; that the procedure was unlawful, and the finding and sentence is void.

J. H. GILLPATRICK,
Of Counsel for Appellant.

165-133

JAN 6 1897
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DAVID G. SWAIM, *Appellant*,
vs.
THE UNITED STATES.
No. 33.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellant.

BENJ. BUTTERWORTH,
JULIAN C. DOWELL,
Attorneys.

The appellant was denied due process of law; he was twice placed in jeopardy; the court was ordered without authority, and the judgment should be that he recover on his petition, and the court be directed to proceed accordingly.

The appellant is subjected to a judgment based on the proceedings of a court convened without authority and void. If the court could take jurisdiction, then it denied the accused due process of law, disregarding essential matters in its procedure, and twice placed the accused in jeopardy. The facts constitute no offence cognizable by military law.

On frivolous facts the President is the accuser. He convenes a court to try the accused, and must, *ex-officio*, review the findings and sentence of the court. He orders a revision and a re-revision to secure a severer sentence. This combines functions obnoxious to the letter and philosophy of the law. It leaves the appellant the victim of direct executive persecution, ending with the whim of the individual. The first sentence—to say nothing about the illegality of the court—would, if approved, have shocked the legal mind at such a carving out of an offence on the facts under the 62d article of war. But the third sentence, so clearly the result of one capricious will, is alarming! "Whatever has its origin in caprice is sure not to improve in progress, nor to end in reason." (Works of Edmund Burke, Vol. V., p. 459.) It is submitted, that the trial of appellant was without authority; that the procedure was unlawful, and the finding and sentence is void.

J. H. GILLPATRICK,
Of Counsel for Appellant.

165-333

Office Supreme Court, U. S.
FILED.
JAN 6 1897
JAMES H. McKENNEY,
CLERK.

165-333.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DAVID G. SWAIM, *Appellant*,
vs.
THE UNITED STATES.
} No. 33.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellant.

BENJ. BUTTERWORTH,
JULIAN C. DOWELL,
Attorneys.

BYRON S. ADAMS, PRINTER.

FILED.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

DAVID G. SWAIM, *Appellant*,
vs.
THE UNITED STATES.
No. 33.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellant.

It is desired in this supplemental statement and brief to present in succinct form the legal questions presented for the consideration and decision of this Court, and to epitomize the argument contained in the brief heretofore filed by General Swaim, in which the questions are considered carefully and more at length.

The following is a concise statement of the facts upon which the issues to be decided arise:

First. Brigadier-General David G. Swaim, then Judge Advocate General of the Army of the United States, now on the retired list, had some private personal business transactions with the firm of Bateman & Co., Brokers, of

the city of Washington. One Brown became interested in the business of Bateman & Co., and to increase his capital he borrowed $5,000 of Swaim to invest in said business. In July, 1883, Brown retired from the firm; the money loaned to Brown by Swaim was not, however, withdrawn from the firm.

Bateman & Co. gave Swaim a due-bill as evidence of the indebtedness of said firm to him. Swaim had at different times bought and sold stocks through Bateman & Co. He had kept an account with that firm.

When it came to settling there was a dispute.

Bateman & Co rendered an account to Swaim, the correctness of which he denied.

The due bill held by Swaim was by him assigned and transferred to Bright, Humphreys & Co., builders, to whom Swaim was indebted, with request that they collect whatever was due upon it by suit if necessary, and give him credit therefor. Bright, Humphreys & Co. demanded payment, which was refused, and suit was brought upon the paper to determine a dispute which it seems could not be otherwise adjusted.

Thereupon Bateman, in his wrath, retaliated by addressing a letter to the Secretary of War, charging that General Swaim made said assignment of the due-bill (overdue paper) for the purpose of committing a fraud on his firm, asserting that there was *nothing* due on the paper and that Swaim knew it when he transferred the due-bill. (The statement that the paper was wholly paid was false, and the statement that Swaim knew it was wholly paid was also false.)

Bateman also charged Swaim with knowingly assisting another officer to sell his (Bateman's) firm, accounts which he knew to be duplicated. This last charge was, however, obviously a makeweight, and General Swaim was acquitted on that charge, so it dropped out of the case, except as it may

be brought in and used as a persuasive prop to sustain or extenuate erroneous and illegal action.

Second. The Secretary of War referred Bateman's letter to General Swaim for such endorsement as he might be pleased to make. A copy of the Bateman letter and General Swaim's endorsement thereon is here printed for convenience:

"1411 F STREET, BATEMAN & CO., BANKERS,
WASHINGTON, D. C., *April 16th, 1884.*

To the HON. SECRETARY OF WAR:

DEAR SIR: It becomes my duty to prefer charges against Brigadier-Gen. D. G. Swaim, at the head of the Bureau of Military Justice of the United States Army, for fraud and for conduct unbecoming an officer and gentleman.

I stand ready to prove that the said D. G. Swaim has committed a fraud, to all intents and purposes, upon the banking-house of Bateman & Co., of which I am a member.

Some two years ago the said D. G. Swaim, having deposited the sum of five thousand dollars, received, upon his departure for the West, a simple due-bill, at his request, to have in case an accident should befall him.

This amount was checked out subsequent to that date by said D. G. Swaim, for which we have a number of vouchers.

After having drawn all the money out and a settlement being made, he negotiated and transferred the due-bill for the full amount with certain parties in this city.

I am further ready to prove the said D. G. Swaim assisted to negotiate with this firm army pay vouchers which he knew to be fraudulent and triplicates of outstanding accounts.

I ask that a court-martial be ordered for the trial of the said D. G. Swaim on charges preferred. I desire, when ordered, to amend this by presenting other charges under the head of conduct unbecoming an officer and a gentleman.

I am, sir, very respectfully,

A. E. BATEMAN."

The endorsement thereon was as follows:

"BUREAU OF MILITARY JUSTICE,
April 18, 1884.

Respectfully returned to the Secretary of War. I had a bank account with Bateman & Co., and, besides, I loaned them five thousand dollars at 6 per cent. interest, for which they gave me an instrument reading: 'Due D. G. Swaim, or order, five thousand dollars, value received. Bateman & Co., Washington, D. C., July 15, 1882.' This is a negotiable promissory note, according to all the authorities on the subject, and was transferred in due course of business and payment demanded, but refused. Bateman & Co. claimed set-offs to the note, the correctness of which I denied. I endeavored to effect a settlement with them or refer the matter to an arbitrator, but without effect. The note was put in suit, but they now agree to refer the whole subject to an arbitrator, and with that view the suit has been withdrawn. The note (or due-bill, as it is incorrectly termed) is now in the possession of Bright and Humphrey, the endorsees thereof.

In regard to the fraudulent pay vouchers, the facts are as follows: Lieutenant-Colonel A. P. Morrow, at the time a member of General Sherman's staff, a comparative stranger to me at the time, came to my office, in company with another officer, and requested me to advance him several months' pay on his pay accounts. I told him I did not do that kind of business, but in a friendly way referred him to brokers in the city doing such business, and named Bateman & Co. with others. I may have given him a note of introduction to that firm. I did not know for some time afterwards that Bateman & Co., had advanced money to Colonel Morrow on his pay accounts.

It will be seen that I had no concern or interest in these pay accounts whatever, and all I did was the friendly act of introducing a brother officer to those who were in the habit of doing what I could not do for him. I have no other knowledge of any other pay account transaction with Bateman & Co. The only request I have to make is, that this statement may receive the same publicity that the within false accusations received.

D. G. SWAIM,
Judge Advocate General."

A mutual friend intervened, and he (Bateman) conceded that he had made the charges against Swaim under misapprehension, to put it mildly, and withdrew them and arranged for an arbitration of the matters in dispute between himself and Swaim.

The following is a copy of his letter withdrawing charges:

"1411 F STREET, BATEMAN & Co., BANKERS,
WASHINGTON, D. C., *April 17th, 1884.*

To the Hon. SECRETARY OF WAR:

DEAR SIR: The suit against our firm on the due-bill mentioned in my charges of yesterday against Gen. D. G. Swaim having been withdrawn and the differences between Gen. Swaim and myself satisfactorily settled, I hereby withdraw the charges contained in my letter of April 16th against said Gen. D. G. Swaim, he claiming they were made under a misapprehension of facts, which I concede.

Very truly yours,

A. E. BATEMAN."

The Secretary of War, without calling upon General Swaim for further or fuller particulars, exhibited distress concerning the want of more ample disclosures about Swaim's personal and private business, and with a zeal for the reputation of the Army that far outran the utmost possible requirements of the occasion, and without inquiry, and without the usual and customary verification of Bateman's charges, and in the presence of Bateman's confession that his charges were made under a misapprehension, and their unconditional withdrawal, he referred the charges to the President, with the recommendation that a court of inquiry be called; and a court was at once ordered to inquire into the facts concerning the Bateman transaction, and the President proceeded to appoint a court of inquiry, and upon their report, which appears upon page — of the Record, the President directed charges to be preferred against Swaim

based upon the report of the court of inquiry, and he also appointed a court (Record, p. —), selecting the members thereof, to try the cause in which he was the accuser of General Swaim, and at the same time the judge who must sit in review upon the proceeding.

How he reviewed the action of his own court in the trial of a cause in which he was the accuser will be referred to hereinafter.

The charges and specifications are found on pages —— of the Record.

In substance they charge that General Swaim, in transferring that due-bill (overdue negotiable paper against which Bateman & Co. could set up any and all defenses as against the assignees that they could against Swaim, thus rendering the commission of a fraud upon Bateman & Co. impossible) to Bright, Humphrey & Co., with directions to collect what what was due thereon, and to bring suit, if necessary, attempted to commit a fraud upon Bateman & Co., and that in so doing he was "guilty of conduct unbecoming an officer and a gentleman."

And further that the endorsement of General Swaim, upon the communication addressed to him by the Secretary of War, was false, evasive, uncandid, and intended to deceive the Secretary, and that his conduct in that behalf was "unbecoming an officer and a gentleman."

These charges and specifications were prepared with the voluminousness and dull elaborativeness which characterizes some of the pleadings filed in such cases, the charge being more terrible in the manner of its presentation than in its substance.

A majority of the members of the court appointed by the President were General Swaim's inferiors in rank, in the absence of any pretense that such selection was unavoidable, except it be found in the idea that the President can do no wrong.

Before the trial was entered upon General Swaim through his counsel, Shellabarger & Wilson and General Grosvenor, moved to dismiss the proceedings on the ground that the court was not legally competent to hear and determine the cause, being illegally constituted, in that it was appointed by the President without the authority of law, he, the President, being in fact the accuser of General Swaim, and not the general commanding the department in which General Swaim was stationed, and because the court, as convened, was illegally constituted, a majority of the members thereof being the inferiors of General Swaim in rank, when the appointment of inferiors in rank could have been avoided.

And we may add a third, stating it thus: Because, not only was the Commander-in-Chief the accuser; not only did he appoint the court and select the members thereof, but he was the reviewing court to sit in judgment to judicially review the proceedings of that court.

There were incidents of the trial that must not pass unnoticed, whether they are reviewable by this Court are not.

Bateman presented a statement of the account alleged to be a transcript of the original entries, the books were at hand. Counsel for Swaim desired witness, Bateman, to turn to the original entries in the books. The witness refused and the court sustained him in that refusal.

A witness was called who had kept the books of Bateman & Co.; he would have testified that Bateman had urged him to make false entries in the books of Bateman & Co. After this witness had been sworn and partly examined, Bateman's attorney, who was acting as counsel for the prosecution, without appointment and without being sworn as the law required, asked the witness if he believed in a Supreme Being. The witness answered that he did not know whether there was a Supreme Being or not; that he neither believed

nor disbelieved in a Supreme Being; he simply did not know.

On that statement the witness was dismissed and his evidence excluded. *He* was too conscientious to *lie* with reference to his knowledge of the Supreme Being, and the *Court* refused to hear him tell what he knew about Bateman.

The Court found General Swain *not guilty* of committing a *fraud* or *attempting* to commit a fraud, but of "attempting" to commit a "*wrong*," against Bateman & Co.

Just what was meant by an attempt to commit a wrong, the court-martial did not know; and in the light of all the facts, the Court of Claims could not imagine, and this Honorable Court may not be able to discover; unless it may be defined to be a suppositious excuse for a sentence wrung from a hesitating and unwilling court.

They also found that the endorsement upon the Bateman letter was uncandid, evasive, and intended to deceive the Secretary of War.

They *did not find* that the endorsement was *false* or in any behalf *wrong*, but it lacked that elaborateness which subsequent disclosures, if they had been of a different character, would have induced a majority of the court to desire.

The endorsement was truthful, candid, unevasive and not intended to deceive anybody. And the finding of the Court of Claims make this clear, but that court say, though the charge of falsity, etc., is untrue, though there was nothing on the facts found by the court-martial to be uncandid, evasive and deceitful about, yet the court-martial in the exercise of that mysterious authority or power described in the word "discretion," which is too often used as a "Letter of Marque and Reprisal"—could legally find as it did.

As soon as the court finished the hearing, and forwarded the findings and sentence to the reviewing court, other charges imputing to General Swaim conduct unbecoming an

officer and gentleman were filed. And the court proceeded to try him on this second installment of charges, and just as the evidence for the prosecution was all in and before he had offered a syllable in defense, by one of those coincidences which make us wonder. The reviewing court returned the findings and sentence to the court with an endorsement disapproving it, and in effect urging that General Swaim be found guilty of the *first charge*, of conduct unbecoming an officer and gentleman, and that the sentence be made to conform to that finding, which meant that the office of Judge Advocate General should be vacated.

No error was pointed out, but the reviewing court was dissatisfied with the acquittal of the accused on the first charge, and in effect requested that he be found guilty, and that the sentence of dismissal be pronounced.

This was accompanied by an argument prepared by the Attorney-General, fierce in matter and manner, and supplementing the President's suggestion by urging a finding and sentence in conformity with what the President seemed to think desirable. And without Swaim or his counsel being accorded an opportunity to be heard, the court proceeded to consider the recommendation of the President and the argument of the Attorney-General in support thereof.

The court complied in a measure with the aggressively-implied request of the President and Attorney-General. They adhered to their findings, however, but by their sentence attempted to vacate the office of Judge Advocate General by suspending General Swaim from rank, etc., for a certain period, and at the end of that time he was to have only the rank of a Major and Judge Advocate.

The second finding and sentence was returned to the court for their consideration with the further suggestion that their sentence could not be carried into effect, and with a further suggestion as to how the court could do what the

President obviously desired to have done, that is, to vacate the office, though it was not expressed in that language.

The court then in response to the suggestion, not to say, implied request, revised their sentence, which was that General Swaim be suspended from rank and receive only half-pay for twelve years. This was sent back to the President, who, it seems, despaired of having the court respond to what appeared to him to be the requirements of the situation, approved the *sentence*.

The sentence was carried into execution not only to the extent of suspending General Swaim from his office and half-pay, but the Government withheld from him also his commutation, quarters, forage, etc.

Thereupon, on the —— day of ———— General Swaim brought an action in the Court of Claims to recover his pay and allowance. The Court of Claims, in the opinion announced, after demonstrating the absurdity of the action of the Court-Martial, and the offensive quality of the acts of the reviewing tribunal, nevertheless dismissed the petition on the ground that the Court-Martial had the discretion to find and sentence and resentence as it did, and the President (under the authority of *ex-parte* Reed) was acting within the pale of the law in doing what he did.

The opinion of the Court of Claims will be found in the Record on pages 32 to 48, inclusive.

The following questions were distinctly raised and passed upon by the Court of Claims, and are now before this court for review :

1. Was the President of the United States, either as Chief Executive or as Commander-in-Chief of the Army, clothed with authority to order and appoint the court-martial to try General Swaim ?

a. The commanding officer, Gen. P. H. Sheridan, in whose department and command General Swaim was serving, was not the accuser nor the prosecutor, but the President was the accuser.

b. May the Commander-in-Chief of the Army be the "accuser," appoint a court to try the cause, and also act as a reviewing court to judicially pass upon the proceeding had in that behalf?

2. If the President was, for any reason, clothed with the authority to order and appoint a court-martial to try General Swaim, was the court appointed by him legally constituted?

a. The President appointed as members of the court a majority of officers inferior in rank to General Swaim, when the appointment of such officers was confessedly avoidable.

b. Is the statute, which is mandatory in form, merely directory in quality? If only directory, what language would be necessary to impart the quality of being mandatory?

3. If the court was legally constituted—

a. Was an offense against military law charged?

b. Was it competent, under the charges preferred and specifications filed, for the court to convict General Swaim of the (alleged) offence mentioned in the finding of the court, to wit, on the facts proven, of "an attempt to commit a *wrong* on Bateman & Co.?"

c. Does the finding of the court upon which sentence was based constitute an offense against military law of which the court-martial should take jurisdiction?

4. May a proceeding by the court which amounts to a plain violation and disregard of the law of evidence to the

obvious injury of the accused be inquired into by this court under the authority of the opinion announced by Chief Justice Marshall in *ex parte* Watkins, 3 Pet., 193, in which the Chief Justice speaks of the court-martial as "one of those inferior courts of limited jurisdiction whose judgment may be questioned collaterally."

5. The 85th Article of War provides "that the Judge Advocate or person officiating as such" shall have administered to him "an oath in the following form," etc., and Article 90 makes the Judge Advocate or the person deputed by him, to an extent, the counsel of the accused. Is the fact that counsel, without appointment under Article 74, or otherwise, and without being sworn, takes charge of the prosecution, a matter this court will inquire into?

5. Was it competent for the reviewing officer, *i. e.*, the President or the Commander-in-Chief, as the case may be, not only to sit in review of the proceedings of the court he had appointed to try the accused in a case where he was the accuser, but to return the finding and sentence with his disapproval coupled with something more than an *implied* request that the court change its finding on the first charge from *not* guilty to *guilty*, and to change the sentence to one which involved the dismissal of the accused from the Army, and support this implied request by an argument vehement in matter and manner, written by the Attorney-General, and failing to secure a finding of guilty as requested, to again return the finding with the former request (in form showing how it could be done) repeated.

6. If all this can be permitted, and there is no redress in the courts, we will soon cease to wonder at the condition of unrest which now prevails throughout the country.

The contention of the Honorable Attorney-General is, and the Court of Claims so held in this case:

The President is Commander-in-Chief of the land and naval forces, and by virtue of that fact he, as Commander-in-Chief, was authorized to appoint the court-martial for the trial of General Swaim.

No case is cited which is on all fours with the case at bar. Nor has any case been cited that approximates to going the length of sustaining such exercise of power—not authority, for that implies the sanction of law—but such exercise of arbitrary power as was exhibited in the case at bar.

If the Commander-in-Chief had authority to appoint the court-martial to try General Swaim, it was cast upon him in one of two ways.

1st. By the statute (Article of War 72) and because as Commander-in-Chief he comes within the catalogue of officers authorized by that statute to appoint courts-martial, or—

2d. He has the authority as an incident or attribute of command.

If he takes authority perforce of the statute, he is of course bound by the provisions of the statute, unless he is *above* the law or General Swaim *beneath* its care.

It follows as a necessary conclusion that under the Seventy-second Article he cannot be accuser, appoint the jury or court, and also sit to review and control the proceedings either as Commander-in-Chief or as a court for the review and correction of errors.

Clothing one person or officer with all these powers would be not only against the letter and spirit of the law, but with or without the sanction of a statute, it would render the

administration of justice a mockery, a cheat, a delusion and a snare.

In appointing a court his acts are executive. In reviewing the proceedings of the court his acts are judicial.

If the authority is an incident of command, several conclusions are the necessary result.

a. It is not more an incident of command in the case of a commander-in-chief than in the case of the command of a general, lieutenant-general, a major-general or brigadier-general.

And if it is an incident of command all the legislation by Congress and by the legislatures of the several States conferring the authority to appoint courts-martial and so regulating its exercise as to prevent its being used as an instrument of autocratic and despotic power, as it obviously was in the case at bar, and to such an extent as to challenge the attention of the Senate and cause exclamations of surprise and indignation in that body, are needless if not foolish acts of legislation.

The functions of command and the functions of hearing and determining as a court are separate and distinct. The one executive and the other judicial. (See Runkle case, p. 558.)

The reasoning of the court in the case of *ex parte* Reed, that the authority must be clothed upon the commander-in-chief as an incident of command, because otherwise a major-general or lieutenant-general might not be liable to trial by court-martial, needs reviewing and revising. With profound respect, it is submitted that the reasoning is not sound nor the conclusions justified.

The obvious intent of the several statutes prescribing and limiting the jurisdiction, duties and powers of courts-martial was and is to provide a tribunal inferior to the Supreme Court for administering justice in a summary manner, in cases where the public exigencies demanded a remedy which the civil courts could not furnish, to try soldiers and sailors for the commission of offenses detrimental to order and discipline in the Army and Navy.

The object to be accomplished rendered it necessary to provide a summary proceeding for dealing with offenders in the Army and Navy while preserving, as far as possible, the safeguards the Constitution and laws of the land throw around the person, liberty and property of those who come within the jurisdiction of the tribunal clothed with jurisdiction in that behalf. It should go without saying that the law should be liberally construed so as to *preserve*, not to *strike down* the muniments of liberty.

While the authority exercised by courts-martial is great, it is not intended to be a *lawless* but a *lawful* authority, and the wide discretion given was not an *arbitrary* but a *legal* discretion.

We insist that whatever authority there was for appointing a court-martial to try General Swaim was to be found in the statute.

The Commander-in-Chief is appointed by the Constitution, but the incidents and attributes of his command are not enlarged or abridged by that fact. If that is not so, and the authority or power *is* an *incident* of command, could its exercise be controlled and regulated by statute? And if it could not, then it must result that one commanding officer had as full authority to appoint a court-martial as another. If the exercise of that authority could be controlled by statute it has been in the case of the Commander-in-Chief as well as in the case of the other general officers. For it is

obvious that the *manner* of appointing the commanding officer cannot change or vary the attributes of command.

The fact that the President is by virtue of his election made Commander-in-Chief of the land and naval forces by the Constitution does not change the incidents, and attributes incident to command any more than if he were appointed to that position by some officer or tribunal clothed with the power of appointment.

It results, therefore, that, as stated, if the power to appoint court-martial is an incident of command, and therefore the Commander-in-Chief has that authority because of the fact that it is an incident of command, it must be equally true that every commanding officer has the like authority as an incident or attribute of command; and if Congress may not control and direct the exercise of this authority in the case of the Commander-in-Chief the conclusion is irresistible that it cannot be controlled at all, except by depriving the officer of command.

But it is readily conceded that in the case of every other commanding officer the exercise of this authority may be controlled and directed so as to render it less dangerous in view of its liability to abuse. A startling example of which the case at bar presents.

It is urged, however, without good or sufficient reason, that it is an incident of command in the case of the Commander-in-Chief because of the existence of a supposed controlling necessity therefor; and that necessity is said to be found in this, that if the Commander-in-Chief did not have this authority as an *incident* of *command* there is no authority of law for trying the general of the Army, or possibly the lieutenant or major-general by court-martial; the logic of that proposition, is that those officers in the case of a dereliction of duty or the commission of crime against so-called military law, might go unpunished, etc.

If it was thoroughly respectful to those who have announced such an opinion, we would show impatience with the unsound reasoning it involves and the conclusion reached.

It involves the proposition that the provisions of a statute enacted for the establishment of a court to try certain offenders is inoperative because there are some offenders not embraced within its terms, or because the machinery for executing the law has not been provided by Congress so as to reach *every one* who might offend.

Therefore, if the plea of necessity could be heard, it is without excuse, since it is within the power of the General-in-Chief to relieve any officer of his command and to retire him from the service by appointing his successor if the Senate shall approve.

But if this were not so, the idea that the Commander-in-Chief is clothed with an authority and power which is above the law and not subject to legislative control in the matter of appointing courts to try citizens who are also soldiers, or otherwise connected with the military service, when the property, reputation, and lives of such citizens are at stake, and having appointed such a court in a case where he is the accuser of the party to be tried, and is compelled to sit as a reviewing court to pass upon the proceedings of the court he has appointed to try his own dispute, is at war with the letter and spirit of the Constitution, the controlling spirit of our institutions, and is a pretense and mockery of justice and is not supported by reason or authority.

It is not true that such authority has been exercised in this country as a mere incident of command by the President as Commander-in-Chief of the Army.

It is vehemently asserted, but the exercise of such sweeping—not to say autocratic—power as a mere incident of command is not pointed out in a single instance. The nearest

case is that of *ex parte* Reed, and that decision will not be approved.

Before the Revolution, when Washington was in command of the troops in Virginia, when his army was being depleted by desertion, he did not exercise this authority, nor was it suggested that without an act of the House of Burgesses enabling him to do so he could exercise such power; nor did he exercise or attempt to exercise any such power as Commander-in-Chief of the Continental Forces, nor of the Armies of the United States, without legislative sanction and legislative regulation and control.

This statement is supported by a careful review of the history of the military of this country and the courts-martial that have been convened. They have invariably been the creatures of statute law, and the proceeding before a court-martial has been controlled from its inception to the final execution of the sentence.

The court-martial is a "tribunal inferior to the Supreme Court," which may be established by Congress.

It is a *judicial* tribunal constituted by Congress "for the government and regulation of the land and naval forces," and this has been asseverated over and over again by this court in many cases.

It is a court of special and limited jurisdiction created for a special purpose, and in the manner of its organization and procedure it must affirmatively appear that each step has been taker in conformity to law.

There is no presumption in its favor.

Strange enough, notwithstanding, in the case at bar, presumptions have not only been in favor of the jurisdiction and regularity of the proceedings, but have been so in the face of the admitted fact that they were neither. I leave this branch of the case, referring to the principal brief, in which the cases in this behalf are cited and commented on.

Conceding for the sake of the argument that there was authority in the accuser to appoint the court to try the cause, we ask was the court so appointed legally constituted? The statute fixes or prescribes the qualifications of members of the court, and no officer not having these qualifications is competent to sit, unless it is unavoidable.

It is clear from the statute that the court was not legally constituted if the appointment of officers inferior in rank to General Swaim could be avoided, and the record discloses that it could have been avoided, and it does not disclose that any attempt was made to avoid it, or that there was any earnest purpose to regard the mandate of the law.

Is it sufficient answer to say the law will presume that the officer did his duty unless the contrary is shown? There is no such presumption in favor of the regularity in this case, and especially can there be no such presumption in the face of the fact disclosed by the record that the appointment of inferiors in rank could have been avoided.

The reason of the provision of the statute is very obvious and cogent. The decisions of this court make it clear that the provisions of the statute, with reference to the organization and proceedings of a court-martial, must be observed, or the reviewing court must know from the record the reason why there was a departure, if such departure could be authorized in any case.

The case of *ex parte* Reed is again invoked as sustaining the proposition that the commanding officer may be accuser, judge and jury, and finally control the action of the court by persuasion which is in influence and for obvious reasons tantamount to a command.

It would be a sufficient reply to say that the authority under which the court was convened in the case of Reed was not on all fours with that which authorized the appointment of a court-martial in the case of General Swaim. In the

latter case the command of law is imperative that inferiors shall not be appointed if it can be avoided, while in the Reed case there are qualifications and exceptions provided for in the statute.

These points are commented upon in the brief heretofore filed.

Without adding to what has been said in the original brief concerning the appointment of juniors in rank to General Swaim, we wish to consider the proceedings of the court in the matter of its findings and sentence and the review by the President, or by his secretary, which must be held to be a review by the President, even though he had no personal knowledge of what was done. As stated, the court-martial found General Swaim not guilty of committing a fraud or attempting to commit a fraud upon Bateman & Co., but found him guilty of attempting to commit a wrong and based that finding upon the facts proven which are disclosed in the records and which have been hereinbefore recited.

There seems to be an impression that the discretion which the court might exercise was one not controlled by law, and that they might find any act which they were not pleased to approve an offence against the law for the preservation of good order and discipline in the Army; that it was not necessary that it should have that quality recognized by law-writers and courts as an offence or cognate thereto. In other words, that it was within the power of that court-martial to make *any act* or *any conduct* an offence according to their pleasure, otherwise called discretion, and to inflict punishment according to their inclination.

Again, this was the power, otherwise called "discretion," the court exercised, and exercised under the persuasive influence of the Commander-in-Chief, under the authority which provides that, "When a court-martial appears to have

erred in any respect, the reviewing authority may reconvene the court for a reconsideration of its action with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings."

Is it so that the error reviewable by the superior court may include the sentence which the lower court was confessedly *authorized to pronounce*, and of which it alone had jurisdiction, so long as that sentence was one authorized by law?

It would certainly be novel to find in criminal proceedings an assignment of error to the effect that the court having jurisdiction had sentenced the accused to one year imprisonment instead of ten, when the law authorized the judge in his discretion to impose a sentence of from one to ten years.

Is it not obvious that the errors contemplated are errors of law or wholly unauthorized or illegal conclusions of fact, as in the case of the second sentence which was one impossible of execution?

If we are not right on this proposition then the lower court might as well be abolished so far as sentence is concerned. In fact, it might as well be abolished for all purposes, and the arbitrary will of the Commander-in-Chief or reviewing officer be substituted therefor, as was in fact in large measure done in this case.

It goes without saying that the proceedings before a court-martial must be such as the law of the land authorizes, and in all proceedings where there is law and precedent, that law and that precedent when essential, if not indispensible to the protection of the citizen, should be adhered to.

In the case at bar it was wholly ignored.

And this argument applies equally to the case of *ex parte*

Reed. In that case, it is respectfully submitted that the reviewing officer had no legal authority to control the lower court in the manner he obviously did, by telling the officers whom he commanded that their sentence was wrong, and asking that it be changed, which, considering his relations to the members of that court, was an arbitrary and intolerable exercise of power, although it might be referred to in polite and diplomatic phrase as merely suggestive of error in their judgment.

Obviously what the reviewing officer did in the Reed case was tantamount, in view of his relations to the court which he had convened, and his power of command over them, to an *order* to change that sentence and inflict a more severe punishment.

That is precisely what was done in the case at bar, and we would be derelict in our duty if we did not denounce it in language at least adequate to fittingly describe the offence.

In order that we may not be deemed to go beyoud the bounds of propriety, we beg to call the attention of the court to the impression the conduct of that court-martial, and that of the reviewing officer, whether the President in person or his Secretary of War, and all the proceedings in that behalf, created upon the members of the United States Senate.

And it is timely here because the report of a Senate Committee is cited in the brief of the Honrable Attorney-General as sustaining the authority which we have called in question.

Without quoting at length the observations of the several Senators who were commenting on this case immediately after these occurrences, a report of which will be found on pages 23, 24, *et seq.*, of the Congressional Record, under date of February 26, 1885, of Forty-eighth Congress, we wish to say,

that a careful examination of the law makes it clear that no such exercise of power or authority was necessary for the maintenance of good order and discipline in the Army, or for any reason discoverable in or out of the record, excusable; nor is it true that Congress had not or was not competent to provide full and ample remedies for every breach of discipline and good order. The trouble seems to have arisen from the fact that the acts complained of were those of persons at the top of the Government, high in authority.

Senators Hoar of Massachusetts, Ingalls of Kansas, Sherman of Ohio, and Conger of Michigan denounced the acts of that court-martial, and those of the reviewing tribunal, as unwarranted, and criticised them, and with good reason, in language that went to the verge of parliamentary toleration.

They commented on the organization of the court, its peculiar and exceptional proceeding and the unwarranted action of the reviewing tribunal in what was in effect a coercion of the court-martial to change its finding from "not guilty" to "guilty," and increase the severity of its sentence so as to vacate the office. They comment upon the course of the Judge Advocate who, when the recommendation of the President, accompanied by the vehement argument of the Attorney-General, was delivered to the court, was closeted with the court to make an argument to which the accused could not be heard in reply.

No Senator offered a word in extenuation or paliation of the official conduct so condemned, although the close friends of the officers criticised offered such apology as could be found in the suggestion that possibly the law authorized what was done, whether it was worthily done or not.

It appears from the record and from the opinion of the Court of Claims that no fraud was committed or attempted upon Bateman & Co. It further appears that the commis-

sion of a fraud or "wrong" was impossible; and, as stated by the Court of Claims. *that* being true, as it indisputably was, there was nothing to induce General Swaim to be false, uncandid, or evasive in his endorsement upon the letter of the Secretary of War. But the court below, in an endeavor, if possible, to apply the doctrine apparently laid down in the case of *ex parte* Reed to the Swaim case and thereby vindicate the freedom of the court-martial and the reviewing tribunal from the charge of oppressive conduct, to put it mildly, suggest, or rather say, it was a discretionary power in the court to say whether, having involved accounts with a broker, for which Swaim was in nowise accountable, and assigning a due bill, to have it collected by suit if necessary, was an offense that might be visited with a sentence which subjected the accused to humiliation and disgrace, and that, although on the record, it appears that no single act of General Swaim rose to the dignity of even an impropriety.

It would seem to be clear to the legal apprehension that the act or conduct which a court-martial may find to be deserving of such condemnation and such sentence as was inflicted on General Swaim must either be an offense known to and recognizable by the law or one of kindred nature fairly deducible from the acts proven. Dynes *vs.* Hoover, 20 How., 284.

In other words, it must involve moral turpitude at least in such degree as to render the officer unfit to associate with gentlemen and unfit to wear the uniform of the Army, and unfit to be trusted. In other words, to make him an object of aversion to honest and straightforward men. There is no legal discretion in any tribunal in this land to seize upon acts, innocent, lawful and harmless in themselves, and in the exercise of what they regard as their *wide discretion*, attribute to those acts qualities not inherent in or deducible

from them, and predicate upon such finding a sentence that can only properly follow the commission of a crime.

It must be borne in mind that the proceedings can only be sent to the President for review in *case of conviction*, and then only for revision, to correct *errors* or mitigate the severity of the sentence, and cannot by any permissible construction of the law governing in such cases be held to embrace authority to revise the sentence, and urge the Court to increase its severity. (See Manual of Mil. Law, English War Office, 1884, p. 393.)

The authorities relied upon in support of the propositions stated and argued herein are cited and commented upon in the brief of General Swaim and our colleague Judge Gillpatrick, and some others to which attention will be called in the oral argument.

Special attention is called to the language of the Court of Claims as found on pages 41, 42 and 43 of the record. They seem to reach the same conclusion counsel for the appellant do, but announce an opinion which, we submit, is at variance therewith.

BENJ. BUTTERWORTH,
JULIAN C. DOWELL,
Attorneys.